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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1883.

No. ~~284~~ 45

THE CLEVELAND, COLUMBUS, CINCINNATI AND INDIANAPOLIS RAILWAY COMPANY, PLAINTIFF IN ERROR,

vs.

D. W. McCLUNG.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF OHIO.

FILED SEPTEMBER 17, 1883.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1885.

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1 At a stated term of the circuit court of the United States within and for the sixth judicial circuit and western division of the southern district of Ohio, begun and held at the court-rooms in the city of Cincinnati on the first Tuesday of February, being the sixth day of that month, in the year of our Lord one thousand eight hundred and eighty-three, and in the one hundred [and] seventh year of the Independence of the United States of America—present, the Honorable John Baxter, circuit judge—among the proceedings had were the following, to wit:

Money.

THE CLEVELAND, COLUMBUS, CINCINNATI & INDIANAPOLIS RAILWAY CO.
vs.
D. W. MCCLUNG. } 3287.

Be it remembered that heretofore, to wit, on the 7th day of November, in the year of our Lord one thousand eight hundred and eighty-two, there was filed in the clerk's office of the court aforesaid a certain petition for certiorari, which said petition is in the words and figures following, to wit:

2 To the honorable judge of the circuit court of the United States for the sixth circuit and southern district of Ohio:

Your petitioner, D. W. McClung, respectfully represents—

That heretofore, to wit, on the 17th day of March, A. D. 1882, the Cleveland, Columbus, Cincinnati & Indianapolis Railway Company, a corporation organized and doing business under the laws of Ohio, began a civil action against him by filing its petition in the superior court of Cincinnati, a court of record of the State of Ohio, said cause being numbered No. 37478 on the docket of said court.

That the ground of action and prayer in said petition set forth is, in substance, as follows, to wit:

That the said Cleveland, Columbus, Cincinnati and Indianapolis Railway Company, at the times hereinafter named, was a common carrier of goods for freight and designated by the Secretary of the Treasury of the United States for the purpose of receiving and transporting dutiable goods from the port of arrival to the port of destination, under and as provided in the act of Congress passed June 10th, 1880, entitled An act to amend the statutes of the United States in relation to the immediate transportation of dutiable goods, and for other purposes.

3 The plaintiff further states that as such common carrier, designated as aforesaid, it transported divers cases of dutiable goods and merchandise between the 10th day of July, 1881, and the 8th day of September, 1881, to divers and sundry firms and persons in Cincinnati upon which freight and charges were due, amounting in the total to eight thousand four hundred and seventy-seven dollars ($8,477.00); that these goods were placed in the control and custody of defendant, who held the office of collector of customs and surveyor at the port of Cincinnati, under the laws of the United

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That the ground of action and prayer in said petition set forth is, in substance, as follows, to wit:

That the said Cleveland, Columbus, Cincinnati and Indianapolis Railway Company, at the times hereinafter named, was a common carrier of goods for freight and designated by the Secretary of the Treasury of the United States for the purpose of receiving and transporting dutiable goods from the port of arrival to the port of destination, under and as provided in the act of Congress passed June 10th, 1880, entitled An act to amend the statutes of the United States in relation to the immediate transportation of dutiable goods, and for other purposes.

3 The plaintiff further states that as such common carrier, designated as aforesaid, it transported divers cases of dutiable goods and merchandise between the 10th day of July, 1881, and the 8th day of September, 1881, to divers and sundry firms and persons in Cincinnati upon which freight and charges were due, amounting in the total to eight thousand four hundred and seventy-seven dollars ($8,477.00); that these goods were placed in the control and custody of defendant, who held the office of collector of customs and surveyor at the port of Cincinnati, under the laws of the United

States as such officer, and he was notified of plaintiff's lien as a common carrier for the freight upon said goods, and that it was defendant's duty not to deliver up the goods until the freight was paid.

Plaintiff further states that the various and divers firms to whom the goods were shipped paid to the defendant the total amount of said freight, amounting to $8,477.00, for the benefit of plaintiff, and that the defendant delivered up said goods without notice to plaintiff, whereby its lien for freight was lost.

Plaintiff further states that although often requested the defendant hath refused to pay said sum of $8,477.00, or any part
4 thereof, to plaintiff, and prays judgment for said sum of $8,477.00, with interest from the 8th day of September, 1881, against the said defendant.

Your petitioner further represents that at the time the said action was begun, and at the times the said acts charged in such petition are alleged to have been done, he was, and still is, an officer of the United States, appointed and acting under the authority of the revenue laws of the United States, to wit, as surveyor of customs for the port of Cincinnati, Ohio, as is stated and set forth in the above petition, and all his acts in connection with the receipt and delivery of the merchandise described in said petition were done by him under color of his said office; that said action was begun with summons, which was duly served upon your petitioner within the said southern district of Ohio and western division thereof, and said action has not yet been tried.

Wherefore your petitioner prays that your honors will cause a writ of certiorari to issue to the said superior court of Cincinnati, Ohio, commanding that it send to this honorable court the record and proceedings in said cause.

CHANNING RICHARDS,
Attorney for Petitioner.

5 UNITED STATES OF AMERICA, *Southern District of Ohio,* } ss:

D. W. McClung, being duly sworn, says that the facts stated in the foregoing petition are true, as he verily believe-.

D. W. McCLUNG.

Sworn to before me and subscribed in my presence this sixth day of November, 1882.

ROB'T C. GEORGI,
Dep. Clerk U. S. Cir. Court, S. D. O.

I, Channing Richards, as attorney and counselor at law of the several courts of record of the State of Ohio, do hereby certify that, as counsel for the above-named petitioner, I have examined the proceedings against him and carefully inquired into the matter set forth in his petition, and that I believe the same are true.

CHANNING RICHARDS.

And thereupon there was issued out of the clerk's office of the court aforesaid our certain writ of certiorari, directed to the judges of the superior court of Cincinnati, in the words and figures following, to wit:

6 *Writ of Certiorari.*

THE UNITED STATES OF AMERICA, } *ss:*
Southern District of Ohio, }

The President of the United States of America to the honorable the judges of the superior court of Cincinnati, Ohio, Greeting:

Being informed that there is now pending before you a certain suit in which The Cleveland, Columbus, Cincinnati and Indianapolis Railway Company, a corporation organized and doing business under the laws of Ohio, is plaintiff, and D. W. McClung defendant, said D. W. McClung being an officer appointed under authority of the revenue laws of the United States, to wit, collector of customs and surveyor of the port of Cincinnati, and said suit being for money alleged to have been received by him under color of said office, which suit was commenced in the said superior court of Cincinnati, Ohio, against the said D. W. McClung, collector, &c., as aforesaid, by a summons issued out of the said court on the 17th day of March, A. D. 1882, and that said suit has not been tried; and we, being willing for certain reasons that the said suit and the records and proceedings therein should be certified by the said court and
7 removed into our circuit court of the United States in and for the southern district of Ohio, in the sixth circuit, do hereby command you that you certify and send the records and proceedings aforesaid, with all things concerning the same, to the said circuit court of the United States, together with this writ, so that you may have the same at the United States court-rooms in the city of Cincinnati, in the said district, on the first Tuesday of February, A. D. 1883, in the said circuit court to be then and there held, that the said circuit court may cause to be further done thereupon what of right and according to the laws of the United States should be done.

Witness the Honorable Morrison R. Waite, Chief Justice of the Supreme Court of the United States, at Cincinnati, O., in said district, this 7th day of November, in the year of our Lord one thousand eight hundred and eighty-two.

Attest:

WM. C. HOWARD,
Clerk U. S. Cir. C'rt, S. D. O.,
[SEAL.] By ROB'T C. GEORGI, *Deputy.*

And afterwards, to wit, on the tenth day of November, in the year last aforesaid, came the marshal of said district, to whom the
8 said writ was in form aforesaid directed, and returned the same into the clerk's office of the court aforesaid, with his proceedings endorsed thereon in the words and figures following, to wit:

Marshal's Return of Writ of Certiorari.

Received this writ at Cincinnati, Ohio, November 10th, 1882, and served the same by true copy hereof at office of Sam'l W. Ramp, clerk of the superior court of Cincinnati, Ohio, with chief clerk of said office, at 10.05 a. m. November 10th, 1882.

J. C. ULLERY,
U. S. M., S. D. O.,
By JOHN W. TURNER, *Dep'y.*

And afterwards, to wit, on the eleventh day of November, in the year last aforesaid, came the plaintiff, by its attorneys, and filed in the clerk's office of the court aforesaid a certain motion to remand the cause to — superior court, which said motion to remand is in the words and figures following, to wit:

Motion to Remand.

THE CLEVELAND, COLUMBUS, CINCINNATI & INDIANAPOLIS RAILWAY CO.
vs.
D. W. MCCLUNG. } 3287.

Motion to remand cause, &c.

Defendant, The Cleveland Columbus, Cincinnati and Indianapolis Railway Company, moves the court herein to remand this
9 cause to the superior court of Cincinnati, Ohio, from whence it was removed, for the reason that this court has no jurisdiction of the person or the subject-matter of the action.

STALLO, KITTREDGE & SHOEMAKER,
Attorneys for Defendant.

And afterwards, to wit, on the fifteenth day of November, in the year last aforesaid, an entry was made upon the journal of said court in said cause, which said entry is in the words and figures following, to wit:

J'rn'l Entry. Motion to Remand Overruled.

THE CLEVELAND, COLUMBUS, CINCINNATI AND INDIANAPOLIS RAILWAY CO.
vs.
D. W. MCCLUNG. } 3287.

Money.

This cause coming on to be heard upon the motion of defendant to remand this cause to the superior court of Cincinnati, it is considered by the court that said motion be overruled, to which the defendant excepts.

And afterwards, to wit, on the seventeenth day of November, in the year last aforesaid, there was filed in the clerk's office of the

court aforesaid a duplicate of the writ of certiorari, with the
10 endorsements thereon, and also a transcript of the record and proceedings of the superior court of Cincinnati, which are in the words and figures following, to wit:

Duplicate of Writ of Certiorari with Endorsements.

THE UNITED STATES OF AMERICA, }
Southern District of Ohio, } *ss:*

The President of the United States of America to the honorable the judges of the superior court of Cincinnati, Ohio, Greeting:

Being informed that there is now pending before you a certain suit in which the Cleveland, Columbus, Cincinnati and Indianapolis Railway Company, a corporation organized and doing business under the laws of Ohio, is plaintiff, and D. W. McClung defendant, said D. W. McClung being an officer appointed under authority of the revenue laws of the United States, to wit, collector of customs and surveyor of the port of Cincinnati, and said suit being for money alleged to have been received by him under color of said office, which suit was commenced in the said superior court of Cincinnati, Ohio, against the said D. W. McClung, collector, &c., as aforesaid, by a summons issued out of the said court on the 17th day of
11 March, A. D. 1882, and that said suit has not been tried; and we, being willing for certain reasons that the said suit and the records and proceedings therein should be certified by the said court and removed into our circuit court of the United States in and for the southern district of Ohio, in the sixth circuit, do hereby command you that you certify and send the records and proceedings aforesaid, with all things concerning the same, to the said circuit court of the United States, together with this writ, so that you may have the same at the United States court-rooms in the city of Cincinnati, in the said district, on the first Tuesday of February, A. D. 1883, in the said circuit court to be then and there held, that the said circuit court may cause to be further done thereupon what of right and according to the laws of the United States should be done.

Witness the Honorable Morrison R. Waite, Chief Justice of the Supreme Court of the United States, at Cincinnati, O., in said district, this 7th day of November, in the year of our Lord one thousand eight hundred and eighty-two.

Attest:

WM. C. HOWARD,
Clerk U. S. Cir. Court, S. D. O.,
[SEAL.] By ROB'T C. GEORGI, *Deputy.*

12 *Endorsements on Writ of Certiorari.*

1882, Nov. 17th.—Pursuant to the command of the within writ, I herewith return a transcript of the record and proceedings (with all things concerning the same) of the suit mentioned within, to wit, The Cleveland, Columbus, Cincinnati & Indianapolis Railway Co., plaintiff, against D. W. McClung, defendant, numbered 37478.

Witness my hand and the seal of the superior court of Cincinnati, Ohio, this 17th day of November, 1882.

SAM'L W. RAMP,
Clerk Superior Court of Cin'ti.

[SEAL.] By EMIL HOFFMAN, *Deputy.*

Transcript.

13 THE STATE OF OHIO, } *ss:*
Hamilton County, }

Superior Court of Cincinnati.

THE CLEVELAND, COLUMBUS, CINCINNATI & INDIANAPOLIS RAILROAD COMPANY, Pl'ff,
vs.
D. W. MCCLUNG, Def't.

Petition.

The plaintiff says that it is a corporation organized and doing business under the laws of the State of Ohio; that at the several times and dates hereinafter set forth the defendant, D. W. McClung, held and discharged the duties of the office of collector of customs and surveyor of the port of the city of Cincinnati, under the laws and Government of the United States of America.

The plaintiff further says that the said Cleveland, Columbus, Cincinnati & Indianapolis Railway Company, at the times hereinafter named, was a common carrier of goods for freight, and was designated by the Secretary of the Treasury of the United States for the purpose of receiving and transporting of dutiable goods from the port of arrival to the port of destination, under and as provided in the act of Congress passed June 10th, 1880, entitled "An act to amend the statutes of the United States in relation to immediate transportation of dutiable goods, and for other purposes."

14

The plaintiff further says that as such common carrier so designated as aforesaid the said Cleveland, Columbus, Cincinnati & Indianapolis Railway Company transported divers cases of dutiable goods and merchandise to the city of Cincinnati in the manner and as provided in said act, to wit, between the 10th day of July, 1881, and the 8th day of September, 1881, forty-one cases and packages of merchandise consigned to Alms & Doepke, a firm doing business in the city of Cincinnati, Ohio, upon which the freight and charges due the said company amounted to the sum of four hundred and sixty-six and $\frac{53}{100}$ dollars, and said goods were received in Cincinnati and placed in the custody and control of the defendant as such officer of the United States as aforesaid, who was duly notified in writing of a lien of said common carrier for freight upon said goods and merchandise as provided in said act.

The plaintiff further says that it became and was the duty of the defendant as such officer to refuse to deliver the said goods and

merchandise until such freight thereon had been paid to the said common carrier.

Plaintiff further says that thereupon the said Alms & Doepke paid to the defendant, and the defendant then and there received, the said sum of $466.53, the freight aforesaid, for the account
15 and benefit of the said Cleveland, Columbus, Cincinnati and Indianapolis Railroad Company, and the defendant then and thereupon caused the said goods and merchandise to be delivered to the said Alms & Doepke without notice to the said railroad company, whereby its lien for said freight was lost.

The plaintiff says that the defendant, though often requested, has not paid said sum of four hundred and sixty-six and $\frac{53}{100}$ dollars, nor any part thereof, to the said Cleveland, Columbus, Cincinnati and Indianapolis Railroad Company, nor to this plaintiff; but said sum, with interest from September 8th, 1881, is now due and unpaid from the defendant to this plaintiff.

2. The plaintiff further says that as such common carrier so designated the Cleveland, Columbus, Cincinnati & Indianapolis Railroad Company transported divers cases of dutiable goods in the manner and as provided in said act, to wit, between the 7th day of June and the 6th day of September, 1881, twenty-two packages consigned to Bart & Hickox, a firm doing business in the city of Cincinnati, Ohio, upon which the freight and charges due the said company amounted to the sum of $78.85, and said goods were received in Cincinnati and placed in the custody and control of the defendant as such officer of the United States as aforesaid,
16 who was duly notified in writing of a lien of said carrier for freight upon said goods and merchandise as provided in said act.

The plaintiff further says that it became and was the duty of the defendant as such officer to refuse to deliver said goods and merchandise until said sum had been paid to the said common carrier.

Plaintiff further says that thereupon the said Bart & Hickox paid to the defendant, and the defendant then and there received, the said sum of $78.85, the freight aforesaid, for the account and benefit of the said Cleveland, Columbus, Cincinnati and Indianapolis Railroad Company, and the defendant then and there caused to be delivered the said goods and merchandise to the said Bart & Hickox without notice to said railroad company, whereby its lien for said freight was lost.

The plaintiff says that the said defendant, though often requested, has not paid the said sum of $78.85, nor any part thereof, to the said Cleveland, Columbus, Cincinnati & Indianapolis Railroad Company, nor to this plaintiff; but said sum, with interest from September 8th, 1881, is now due and unpaid from the defendant to this plaintiff.

3. Plaintiff further says that as such common carrier so designated the Cleveland, Columbus, Cincinnati & Indianapolis
17 Railroad Company transported divers cases of dutiable goods in the manner and as provided in said act, to wit, on the 16th day of August, 1881, thirteen packages consigned to Le Roy Brooks, doing business in the city of Cincinnati, Ohio, upon which the freight

and charges due the said company amounted to the sum of $22.01, and said goods were placed in the custody and control of the defendant as such officer of the United States as aforesaid, who was duly notified in writing of the lien of said carrier for freight upon said goods and merchandise as provided in said act.

The plaintiff further says that it became and was the duty of the defendant as such officer to refuse to deliver said goods and merchandise until said sum had been paid to the said common carrier.

Plaintiff further says that thereupon the said Le Roy Brooks paid to the defendant, and the defendant then and there received, the said sum of $22.01, the freight aforesaid, for the account and benefit of the Cleveland, Columbus, Cincinnati & Indianapolis Railroad Company, and the defendant then and there caused the said goods and merchandise to be delivered to the said Le Roy Brooks without notice to said railroad company, whereby its lien for said freight was lost.

18 The plaintiff says that the said defendant, though often requested, has not paid the said sum — $22.01, nor any part thereof, to the said Cleveland, Columbus, Cincinnati & Indianapolis Railroad Company, nor this plaintiff; but said sum, with interest from September 8th, 1881, is now due and unpaid from the defendant to the plaintiff.

4. The plaintiff further says that as such common carrier so designated the Cleveland, Columbus, Cincinnati & Indianapolis Railroad Company transported divers cases of dutiable goods in the manner and as provided in said act, to wit, between the 30th of June and the 6th day of July, 1881, seven packages consigned to Bohm Brothers & Co., a firm doing business in the city of Cincinnati, Ohio, upon which the freight and charges due the said company amounted to the sum of $78.31, and said goods were placed in the custody and control of the defendant as such officer of the United States as aforesaid, who was duly notified in writing of a lien of said carrier for freight upon said goods and merchandise as provided in said act.

The plaintiff further says that it became and was the duty of the defendant as such officer to refuse to deliver said goods and merchandise until said sum had been paid to the said common carrier.

Plaintiff further says that thereupon the said Bohm Brothers & Co. paid to the defendant, and the defendant then and there

19 received, the said sum of $78.31, the freight aforesaid, for the account and benefit of the Cleveland, Columbus, Cincinnati & Indianapolis Railroad Company, and the defendant then and there caused to be delivered the said goods and merchandise to the said Bohm Brothers & Co. without due notice to said railroad company, whereby its lien for said freight was lost

The plaintiff says that the said defendant, though often requested, has not paid the said sum of $78.31, nor any part thereof, to the said Cleveland, Columbus, Cincinnati & Indianapolis Railroad Company, nor to this plaintiff; but said sum, with interest from September 8th, 1881, is now due and unpaid from the defendant to the plaintiff.

5. Plaintiff further says that as such common carrier so designated the Cleveland, Columbus, Cincinnati & Indianapolis Railroad Company transported divers cases of dutiable goods in the manner and as provided in said act, to wit, on August 19th, 1881, two packages consigned to Buchan Brothers & Co., a firm doing business in the city of Cincinnati, Ohio, upon which the freight and charges due the said company amounted to the sum of $27.03. and said goods were received in Cincinnati and placed in the custody and control of the defendant as such officer of the United States as aforesaid,
20 who was duly notified in writing of a lien of said carrier for freight upon said goods and merchandise as provided in said act.

The plaintiff further says that it became and was the duty of the defendant as such officer to refuse to deliver said goods and merchandise until said sum had been paid to the said common carrier.

Plaintiff further says that thereupon the said Buchanan Bros. & Co. paid to the defendant, and the defendant then and there received, the said sum of $27.03, the freight aforesaid, for the account of and benefit of the said Cleveland, Columbus, Cincinnati & Indianapolis Railroad Company, and the defendant then and there caused to be delivered the said goods and merchandise to the said Buchanan Bros. & Co. without notice to said railroad company, whereby its lien for said freight was lost.

The plaintiff says that the said defendant, though often requested, has not paid the said sum of $27.03, nor any part thereof, to the said Cleveland, Columbus, Cincinnati & Indianapolis Railroad Company, nor to this plaintiff; but said sum, with interest from September 8th, 1881, is now due and unpaid from the defendant to the plaintiff.

6. The plaintiff further says that as such common carrier so designated the Cleveland, Columbus, Cincinnati & Indianapolis
21 Railroad Company transported divers cases of dutiable goods in the manner and as provided in said act, to wit, on July 21st, 1881, three packages consigned to Calerdine Bros. & Co., a firm doing business in the city of Cincinnati, Ohio, upon which the freight and charges due the said company amounted to the sum of $27.78, and said goods were received in Cincinnati and placed in the custody and control of the defendant as such officer of the United States as aforesaid, who was duly notified in writing of a lien of said carrier for freight upon said goods and merchandise as provided in said act.

The plaintiff further says that it became and was the duty of the defendant as such officer to refuse to deliver said goods and merchandise until said sum had been paid to the said common carrier.

Plaintiff further says that thereupon the said Calardine Bros. & Co. paid to the defendant, and the defendant then and there received, the said sum of $27.78, the freight aforesaid, for the account and benefit of the Cleveland, Columbus, Cincinnati & Indianapolis Railroad Company, and the defendant then and there caused to be delivered the said goods and merchandise to the said Calardine Bros.

& Co. without notice to said railroad company, whereby its lien for said freight was lost.

The plaintiff says that the said defendant, though often
22 requested, has not paid the said sum of $27.78, nor any part thereof, to the said Cleveland, Columbus, Cincinnati & Indianapolis Railroad Company, nor to this plaintiff; but said sum, with interest from September 8th, 1881, is now due and unpaid from the defendant to the plaintiff.

7. The plaintiff further says that as such common carrier so designated the Cleveland, Columbus, Cincinnati & Indianapolis Railroad Company transported divers cases of dutiable goods in the manner and as provided in said act, to wit, between August 14th and September 9th, 1881, nine packages consigned to W. G. Caldwell & Co., a firm doing business in the city of Cincinnati, Ohio, upon which the freight and charges due the said company amounted to the sum of $53.93, and said goods were placed in the custody and control of the defendant as said officer of the United States as aforesaid, who was duly notified in writing of a lien of said carrier for freight upon said goods and merchandise as provided in said act.

The plaintiff further says that it became and was the duty of the defendant as such officer (of) to refuse to deliver said goods and merchandise until said sum had been paid to the said car-
23 rier. Plaintiff further says that thereupon the said W. G. Caldwell & Co. paid to the defendant, and the defendant then and there received, the sum of $53.93, the freight aforesaid, for the account and benefit of the Cleveland, Columbus, Cincinnati and Indianapolis Railroad Company, and the defendant then and there caused to be delivered the said goods and merchandise to the said W. G. Caldwell & Co. without notice to said railroad company, whereby its lien for said freight was lost.

The plaintiff says that the said defendant, though often requested, has not paid the said sum of $53.98, nor any part thereof, to the said Cleveland, Columbus, Cincinnati — Railroad Company, nor to this plaintiff; but said sum, with interest from September 8th, 1881, is now due and unpaid from the defendant to the plaintiff.

8. The plaintiff further says that as such common carrier so designated the Cleveland, Columbus, Cincinnati and Indianapolis Railroad Company transported divers cases of dutiable goods in the manner and as provided in said act, to wit, on August 20th, 1881, four packages consigned to Cornelius Bros., doing business in the city of Cincinnati, Ohio, upon which the freight and charges due the said company amounted to the sum of $20.63, and
24 said goods were placed in the custody and control of the defendant as such officer of the United States as aforesaid, who was duly notified in writing of a lien of said carrier for freight upon said goods and merchandise as provided in said act.

The plaintiff further says that it became and was the duty of the defendant as such officer to refuse to deliver said goods and merchandise until said sum had been paid to the said common carrier

Plaintiff further says that thereupon the said Cornelius Bros. paid to the defendant, and the defendant then and there received, the said

sum of $20.63, the freight aforesaid, for the account and benefit of the Cleveland, Columbus, Cincinnati & Indianapolis Railroad Company, and the defendant then and there caused to be delivered the said goods and merchandise to the said Cornelius Bros. without notice to said railroad company, whereby its lien for said freight was lost.

The plaintiff says that the said defendant, though often requested, has not paid the said sum of $20.63, nor any part thereof, to the said Cleveland, Columbus, Cincinnati & Indianapolis Railroad Company, nor to this plaintiff; but said sum, with interest from September 8th, 1881, is now due and unpaid from the defendant to the plaintiff.

25 9. Plaintiff further says that as such common carrier [so] designated the Cleveland, Columbus, Cincinnati and Indianapolis Railroad Company transported divers cases of dutiable goods in the manner and as provided in said act, to wit, between the 5th and 10th days of December, 1878, four packages consigned to Thos. Cullinaham, doing business in the city of Cincinnati, Ohio, upon which the freight and charges due to the said company amounted to the sum of $86.88, and said goods were received in Cincinnati, and placed in the custody and control of the defendant as such officer of the United States as aforesaid, who was duly notified in writing of a lien of said carrier for freight upon said goods and merchandise as provided in said act.

The plaintiff further says that it became and was the duty of the defendant to refuse to deliver said goods and merchandise until said sum had been paid to the said common carrier.

Plaintiff further says that thereupon the said Thos. Cullinaham paid to the defendant, and the defendant then and there received, the said sum of $86.88, the freight aforesaid, for the account of and benefit of the said Cleveland, Columbus, Cincinnati & Indianapolis

26 Railroad Company, and the defendant then and there caused to be delivered the said goods and merchandise to the said Thos. Cullinahan without notice to said railroad company, whereby its lien for said freight was lost.

The plaintiff says that the said defendant, though often requested, has not paid the said sum of $86.88, nor any part thereof, to the said Cleveland, Columbus, Cincinnati & Indianapolis Railroad Company, nor to this plaintiff; but said sum, with interest from September 8th, 1881, is now due and unpaid from the defendant to the plaintiff.

10. The plaintiff further says that as such common carrier so designated the Cleveland, Columbus, Cincinnati & Indianapolis Railroad Company transported divers cases of dutiable goods in the manner and as provided in said act, to wit, on the 5th day of July, 1881, fifty-four packages consigned to G. H. Dean, doing business in the city of Cincinnati, Ohio, upon which the freight and charges due the said company amounted to the sum of $335.83, and said goods were placed in the custody and control of the defendant as such officer of the United States as aforesaid, who was duly notified in writing of a lien of said carrier for freight upon said goods and merchandise as provided in said act.

27 The plaintiff further says that it became and was the duty of the defendant as such officer to refuse to deliver said goods and merchandise until said sum had been paid to the said carrier.

Plaintiff further says that thereupon the said G. H. Dean paid to the defendant, and the defendant then and there received, the said sum of $335.83, freight aforesaid, for the account and benefit of the Cleveland, Columbus, Cincinnati & Indianapolis Railroad Company, and the defendant then and there caused to be delivered the said goods and merchandise to the said G. H. Dean without notice to said railroad company, whereby its lien for said freight was lost.

The plaintiff says that the said defendant, though often requested, has not paid the said sum of $335.83, nor any part thereof, to the said Cleveland, Columbus, Cincinnati & Indianapolis Railroad Company, nor to this plaintiff; but said sum, with interest from September 8th, 1881, is now due and unpaid from the defendant to the plaintiff.

11. Plaintiff further says that as such common carrier so designated the Cleveland, Columbus, Cincinnati & Indianapolis Railroad Company transported divers cases of dutiable goods in the manner and as provided in said act, to wit, on August 15th, 1881,

28 three packages consigned to Daniels & Coombe, a firm doing business in the city of Cincinnati, Ohio, upon which the freight and charges due the said company amounted to the sum of $32.14, and said goods were placed in the custody and control of the defendant as such officer of the United States as aforesaid, who was duly notified in writing of a lien of said carrier for freight upon said goods as merchandise as provided in said act.

The plaintiff further says that it became and was the duty of the defendant as such officer to refuse to deliver said goods and merchandise until said sum had been paid to said common carrier.

Plaintiff further says that thereupon the said Daniels & Coombe paid to the defendant, and the defendant then and there received, the said sum of $32.14, the freight aforesaid, for the account and benefit of the Cleveland, Columbus, Cincinnati & Indianapolis Railroad Company, and the defendant then and there caused to be delivered the said goods and merchandise to the said Daniels & Coombe without notice to said railroad company, whereby its lien for said freight was lost

The plaintiff says that the said defendant, though often requested, has not paid the said sum of $32.14, nor any part thereof, to

29 the said Cleveland, Columbus, Cincinnati & Indianapolis Railroad Company, nor to this plaintiff; but said sum, with interest from September 8th, 1881, is now due and unpaid from the defendant to the plaintiff.

12. The plaintiff further says that as such common carrier so designated the Columbus, Cleveland, Cincinnati & Indianapolis Railroad Company transported divers cases of dutiable goods in the manner and as provided in said act, to wit, on August 6th, 1881, five packages consigned to Tice & Huntington, a firm doing business in the city of Cincinnati, Ohio, upon which the freight and charges

due the said company amounted to the sum of $32.93, and said goods were placed in the custody and control of the defendant as such officer of the United States as aforesaid, who was duly notified in writing of a lien of said carrier for freight upon said goods and merchandise as provided in said act.

The plaintiff further says that it became and was the duty of the defendant as such officer to refuse to deliver said goods and merchandise until said sum had been paid to the common carrier.

Plaintiff further says that thereupon the said Tice & Huntington paid to the defendant, and the defendant then and there received, the sum of $32.93, the freight aforesaid, for the account and benefit of the Cleveland, Columbus, Cincinnati & Indianapolis Railroad Company, and the defendant then and there caused to be delivered the said goods and merchandise to the said Tice & Huntington without notice to said railroad company, whereby its lien for said freight was lost.

The plaintiff says that the said defendant, though often requested, has not paid the said sum of $32.93, nor any part thereof, to the said Cleveland, Columbus, Cincinnati & Indianapolis Railroad Company, nor to this plaintiff; but said sum, with interest from September 8th, 1881, is now due and unpaid from the defendant to the plaintiff.

13. The plaintiff further says that as such common carrier so designated the Cleveland, Columbus, Cincinnati & Indianapolis Railroad Company transported divers cases of dutiable goods in the manner and as provided in said act, to wit, on August 13th, 1881, one package of goods consigned to J. H. Twachtman, upon which the freight and charges due said company amounted to the sum of $3.75, and said goods were received in Cincinnati and placed in bonded warehouse in the custody and control of the defendant as such officer of the United States as aforesaid, who was duly notified in writing of a lien of said carrier for freight upon said goods and merchandise *and* provided in said act.

The plaintiff further says that it became and was the duty of the defendant as such officer to refuse to deliver said goods and merchandise until said sum had been paid to said common carrier.

The plaintiff further says that thereupon the said J. H. Twachtman paid to the defendant, and the defendant then and there received, the said sum of $3.77, the freight aforesaid, for the benefit and account of the said Cleveland, Columbus, Cincinnati and Indianapolis Railroad Company, and the defendant then and there caused to be delivered the said goods and merchandise to the said J. H. Twachtman without notice to said railroad company, whereby its lien for said freight was lost.

The plaintiff says that the said defendant, though often requested, has not paid the said sum of $3.77, nor any part thereof, to the said Cleveland, Columbus, Cincinnati & Indianapolis Railroad Company, nor to this plaintiff; but said sum, with interest from September 8th, 1881, is now due and unpaid from the defendant to this plaintiff.

14. The plaintiff further says that as such common carrier so designated the Cleveland, Columbus, Cincinnati & Indianapolis Railroad Company transported divers cases of dutiable

account and benefit of said Cleveland, Columbus, Cincinnati & Indianapolis Railroad Company, and the defendant then and there caused to be delivered the said goods and merchandise to the said George Fisher without notice to said railroad company, whereby its lien for said freight was lost, $24.32.

The plaintiff says that the said defendant, though often requested, has not paid the said sum of $24.32, nor any part thereof, to the said Cleveland, Columbus, Cincinnati & Indianapolis Railroad Company, nor to this plaintiff; but said sum, with interest from September 8th, 1881, is now due and unpaid from the defendant to this plaintiff.

18. The plaintiff further says that as such common carrier so designated the Cleveland, Columbus, Cincinnati & Indianapolis Railroad Company transported divers causes of dutiable goods in the manner and as provided in said act, to wit, on the 9th day of August, 1881, fifty-five packages consigned to Freiburg & Workum, a firm doing business in the city of Cincinnati, Ohio, upon which the freight and charges due to said company amounted to the sum of $42.00, and said goods were received in Cincinnati and
38 placed in the custody and control of the defendant as such officer of the United States as aforesaid, who was duly notified in writing of a lien of said carrier for freight upon said goods and merchandise as provided in said act.

The plaintiff further says that it became and was the duty of the defendant as such officer to refuse to deliver said goods and merchandise until said sum had been paid to the said common carrier. Plaintiff further says that thereupon the said Freiburg & Workum paid to the defendant, and the defendant then and there received, the said sum of $42.00, the freight aforesaid, for the benefit and account of the said Cleveland, Columbus, Cincinnati & Indianapolis Railroad Company, and the defendant then and there caused to be delivered the said goods and merchandise to the said Freiburg & Workum without notice to said railroad company, whereby its lien for said freight was lost.

The plaintiff says that the said defendant, though often requested, has not paid the said sum of $42.00, nor any part thereof, to the Cleveland, Columbus, Cincinnati & Indianapolis Railroad Company, nor to this plaintiff; but said sum, with interest from September 8th, 1881, is now due and unpaid from the defendant to this plaintiff.

39 19. The plaintiff further says that as such common carrier so designated the Cleveland, Columbus, Cincinnati & Indianapolis Railroad Company transported divers cases of dutiable goods in the manner and as provided in said act, to wit, on the 10th day of August, 1881, twenty-five packages consigned to Z. Getchell, doing business in the city of Cincinnati, Ohio, upon which the freight and charges due to said company amounted to the sum of $70.75, and said goods were received in Cincinnati, and placed in the custody and control of the defendant as such officer of the United States as aforesaid, who was duly notified in writing of a lien of said carrier

for freight upon said goods and merchandise as provided in said act.

The plaintiff further says that it became and was the duty of the defendant as such officer to refuse to deliver said goods and merchandise until said sum had been paid to the said common carrier.

Plaintiff further says that thereupon the said Z. Getchell paid to the defendant, and the defendant then and there received, the said sum of $70.75, the freight aforesaid, for the account and benefit of said Cleveland, Columbus, Cincinnati & Indianapolis Railroad Company, and the defendant then and there caused to be delivered
40 the said goods and merchandise to the said Z. Getchell without notice to said railroad company, whereby its lien for said freight was lost.

The plaintiff says that the said defendant, though often requested, has not paid the said sum of $70.75, nor any part thereof, to the said Cleveland, Columbus, Cincinnati & Indianapolis Railroad Company, nor to this plaintiff; but said sum, with interest from September 8th, 1881, is now due and unpaid from the defendant to this plaintiff.

20. The plaintiff further says that as such common carrier so designated the Cleveland, Columbus, Cincinnati & Indianapolis Railroad Company transported divers cases of dutiable goods in the manner and as provided in said act, to wit, between the 4th of August and the 4th of September, 1881, thirteen packages, consigned to Haas & Weiss, a firm doing business in the city of Cincinnati, Ohio, upon which the freight and charges due the said company amounted to the sum of $143.57, and said goods were received in Cincinnati and placed in the custody and control of the defendant as such officer of the United States as aforesaid, who was duly notified in writing of a lien of said carrier for freight upon said goods and merchandise as provided in said act.

The plaintiff further says that it became and was the duty
41 of the defendant as such officer to refuse to deliver said goods and merchandise until said sum had been paid to the said common carrier.

Plaintiff further says that thereupon the said Haas & Weiss paid to the defendant, and the defendant then and there received, the said sum of $143.57, the freight aforesaid, for the account and benefit of the said Cleveland, Columbus, Cincinnati & Indianapolis Railroad Company, and the defendant then and there caused to be delivered the said goods and merchandise to the said Haas & Weiss without notice to the said railroad company, whereby its lien for said freight was lost.

The plaintiff says that the said defendant, though often requested, has not paid the said sum of $143.57, nor any part thereof, to the said Cleveland, Columbus, Cincinnati & Indianapolis Railroad Company, nor to this plaintiff; but said sum, with interest from September 8th, 1881, is now due and unpaid from the defendant to this plaintiff.

21. The plaintiff further says that as such common carrier so designated the Cleveland, Columbus, Cincinnati & Indianapolis

Railroad Company transported divers cases of dutiable goods in the manner and as provided in said act, to wit, on August 2nd, 1881, twelve packages consigned to C. Hellebush, doing business
42 in Cincinnati, Ohio, upon which the freight and charges due to the said company amounted to the sum of $120.95, and said goods were received in Cincinnati and placed in the custody and control of the defendant as such officer of the United States as aforesaid, who was duly notified in writing of a lien of said carrier for freight upon said goods and merchandise as provided in said act.

The plaintiff further says that it became and was the duty of the defendant as such officer to refuse to deliver said goods and merchandise until said sum had been paid said common carrier.

Plaintiff further says that thereupon the said C. Hellebush paid to the defendant, and the defendant then and there received, the said sum of $120.95, the freight aforesaid, for the account and benefit of the said Cleveland, Columbus, Cincinnati & Indianapolis Railroad Company, and the defendant then and there caused to be delivered the said goods and merchandise to the said C. Hellebush without notice to the said railroad company, whereby its lien for said freight was lost.

The plaintiff says that the said defendant, though often requested, has not paid the said sum of $120.95, nor any part thereof,
43 to the said Cleveland, Columbus, Cincinnati & Indianapolis Railroad Company, nor to this plaintiff; but said sum, with interest from September 8th, 1881, is now due and unpaid from the defendant to this plaintiff.

22. The plaintiff further says as such common carrier so designated the Cleveland, Columbus, Cincinnati & Indianapolis Railroad Company transported divers cases of dutiable goods in the manner and as provided in said act, to wit, on June 8th, 1881, fifty packages consigned to Hoffheimer Bros., a firm doing business in the city of Cincinnati, Ohio, upon which the freight and charges due to said company amounted to the sum of $60.35, and said goods were received in Cincinnati and placed in the custody and control of the defendant as such officer of the United States as aforesaid, who was duly notified in writing of a lien of said carrier for freight upon said goods and merchandise as provided in said act.

The plaintiff further says that it became and was the duty of the defendant as such officer to refuse to deliver said goods and merchandise until said sum had been paid to the said common carrier.

Plaintiff further says that thereupon the said Hoffheimer Bros. paid to the defendant, and the defendant then and there re-
44 ceived, the said sum of $60 35, the freight aforesaid, for the account and benefit of the said Cleveland, Columbus, Cincinnati & Indianapolis Railroad Company, and the defendant then and there caused to be delivered the said goods and merchandise to the said Hoffheimer Bros. without notice to said railroad company, whereby its lien for said freight was lost.

The plaintiff further says that the said defendant, though often requested, has not paid the said sum of $60.35, nor any part thereof, to the said Cleveland, Columbus, Cincinnati & Indianapolis Rail-

road Company, nor to this plaintiff; but said sum, with interest from September 8th, 1881, is now due and unpaid from the defendant to this plaintiff.

23. The plaintiff further says that as such common carrier so designated the Cleveland, Columbus, Cincinnati & Indianapolis Railroad Company transported divers cases of dutiable goods in the manner and as provided in said act, to wit, between the 5th day of July and the 27th day of August, 1881, three hundred and sixty-four packages consigned to Hartmann, Laist & Co., a firm doing business in the city of Cincinnati, Ohio, upon which the freight and charges due said company amounted to the sum of $2,704.26,
45 and said goods were received in Cincinnati and placed in the custody and control of the defendant as such officer of the United States as aforesaid, who was duly notified in writing of a lien of said carrier for freight upon said goods and merchandise as provided in said act.

Plaintiff further says that it became and was the duty of the defendant as such officer to refuse to deliver said goods and merchandise until said sum had been paid to the said common carrier.

Plaintiff further says that thereupon the said Hartmann, Laist & Co. paid defendant, and the defendant then and there received, the said sum of $2,704.26, the freight aforesaid, for the account and benefit of the said Cleveland, Columbus, Cincinnati & Indianapolis Railroad Company, and the defendant then and there caused to be delivered the said goods and merchandise to the said Hartmann, Laist & Co. without notice to said railroad company, whereby its lien for said freight was lost.

Plaintiff further says that the said defendant, though often requested, has not paid the said sum of $2,704.26, nor any part thereof, to the said Cleveland, Columbus, Cincinnati & Indianapolis Railroad Company, nor to this plaintiff; but said sum, with interest
46 from September 8th, 1881, is now due and unpaid from the defendant to this plaintiff.

24. The plaintiff further says that as such common carrier so designated the Cleveland, Columbus, Cincinnati & Indianapolis Railroad Company transported divers cases of dutiable goods in the manner and as provided in said act, to wit, between the 3rd day of August and the 4th day of September, 1881, sixty-two (62) packages consigned to Knost Bros. & Co., a firm doing business in city of Cincinnati, Ohio, upon which the freight and charges due said company amounted to the sum of $355.90, and said goods were received in Cincinnati and placed in the custody and control of the defendant as such officer of the United States as aforesaid, who was duly notified in writing of a lien of said carrier for freight upon said goods and merchandise as provided in said act.

The plaintiff further says that it became and was the duty of the defendant as such officer to refuse to deliver said goods and merchandise until said sum had been paid to said common carrier.

Plaintiff further says that thereupon the said Knost Bros. & Co. paid to the defendant, and the defendant then and there received, the said sum of $355.90, the freight aforesaid, for the account

47 and benefit of the said Cleveland, Columbus, Cincinnati & Indianapolis Railroad Company, and the defendant then and there caused to be delivered the goods and merchandise to the said Knost Bros. & Co. without notice to said railroad company, whereby its lien for said freight was lost.

The plaintiff says that the defendant, though often requested, has not paid said sum of $350.90, nor any part thereof, to the Cleveland, Columbus, Cincinnati & Indianapolis Railroad Company, nor to this plaintiff; but said sum, with interest from September 8th, 1881, is now due and unpaid from the defendant to this plaintiff.

25. The plaintiff further says as such common carrier so designated the Cleveland, Columbus, Cincinnati & Indianapolis Railroad Company transported divers cases of dutiable goods in the manner and as provided in said act, to wit, between the 19th day of July and the 18th day of August, 1881, twenty-nine packages consigned to B. Kittredge & Co., a firm doing business in [the] city of Cincinnati, Ohio, upon which the freight and charges due the said Company amounted to the sum of $135.54, and said goods were received in Cincinnati and placed in the custody and control of the defendant as such officer of the United States as aforesaid, who was
48 duly notified in writing of a lien of said carrier for freight upon said goods and merchandise as provided in said act.

The plaintiff further says that it became and was the duty of the defendant as such officer to refuse to deliver said goods and merchandise until said sum had been paid said common carrier.

Plaintiff further says that thereupon the said B. Kittredge & Co. paid to the defendant, and the defendant then and there received, the sum of $135.54, the freight aforesaid, for the account and benefit of the said Cleveland, Columbus, Cincinnati & Indianapolis Railroad Company, and the defendant then and there caused to be delivered the said goods and merchandise to the said B. Kittredge & Co. without notice to said railroad company, whereby its lien for said freight was lost.

The plaintiff says that the said defendant, though often requested, has not paid the said sum of $135.54, nor any part thereof, to the said Cleveland, Columbus, Cincinnati & Indianapolis Railroad Company, nor to this plaintiff; but said sum, with interest from September 8th, 1881, is now due and unpaid from the defendant to this plaintiff.

26. The plaintiff further says that as such common carrier so designated the Cleveland, Columbus, Cincinnati & Indianapolis
49 Railroad Company transported divers cases of dutiable goods in the manner and as provided in said act, to wit, on the 20th day of August, 1881, two packages consigned to H. & J. Koch, a firm doing business in the city of Cincinnati, Ohio, upon which the freight and charges due the said company amounted to the sum of $16.29, and said goods were received in Cincinnati and placed in the custody and control of the defendant as such officer of the United States as aforesaid, who was duly notified in writing of a lien of said carrier for freight upon said goods and merchandise as provided in said act.

The plaintiff further says that it became and was the duty of the said defendant as such officer to refuse to deliver said goods and merchandise until said sum had been paid said common carrier.

Plaintiff further says that thereupon the said H. & J. Koch paid to the defendant, and the defendant then and there received, the said sum of $16.29, the freight aforesaid, for the benefit and account of the said Cleveland, Columbus, Cincinnati & Indianapolis Railroad Company, and the defendant then and there caused to be delivered the said goods and merchandise to the said H. & J. Koch without notice to said railroad company, whereby its lien for said freight was lost.

50 The plaintiff says that the defendant, though often requested has not paid the said sum of $16.29, nor any part thereof, to the said Cleveland, Columbus, Cincinnati & Indianapolis Railroad Company, nor to this plaintiff; but said sum, with interest from September 8th, 1881, is now due and unpaid from the defendant to this plaintiff.

27. The plaintiff further says that as such common carrier so designated the Cleveland, Columbus, Cincinnati & Indianapolis Railroad Company transported divers cases of dutiable goods in the manner and as provided in said act, to wit, on August 12th, one package consigned to Krebs Lithographing Company, doing business in Cincinnati, Ohio, upon which the freight and charges due said company amounted to the sum of $14.89, and said goods were placed in the custody and control of the defendant as such officer of the United States as aforesaid, who was duly notified in writing of a lien of said carrier for freight upon said goods and merchandise as provided in said act.

The plaintiff further says that it became and was the duty of the defendant as such officer to refuse to deliver said goods and merchandise until said sum had been paid to said common carrier.

51 The plaintiff further says that thereupon the said Krebs Lithographing Company paid to the defendant, and the defendant then and there received, the said sum of $14.39, the freight aforesaid, for the account and benefit of the Cleveland, Columbus, Cincinnati and Indianapolis Railroad Company, and the defendant then and there caused to be delivered the said goods and merchandise to the said Krebs Lithographing Company without notice to said railroad company, whereby its lien for said freight was lost.

The plaintiff says that the said defendant, though often requested, has not paid the said sum of $14.39, nor any part thereof, to the Cleveland, Columbus, Cincinnati and Indianapolis Railroad Company, nor to this plaintiff; but said sum, with interest from September 8th, 1881, is now due and unpaid from the defendant to this plaintiff.

28. The plaintiff further says that as such common carrier so designated the Cleveland, Columbus, Cincinnati & Indianapolis Railroad Company transported divers cases of dutiable goods in the manner and as provided in said act, to wit, on 29th day of August, 1881, two (2) packages consigned to Carl Kleve, doing business in [the] city of Cincinnati, Ohio, upon which the freight and charges due to

said company amounted to the sum of $19.57, and said goods
52 were received in Cincinnati and placed in the custody and control of the defendant as such officer of the United States as aforesaid, who was duly notified in writing of a lien of said carrier for freight upon said goods and merchandise *and* provided in said act.

The plaintiff further further says that it became and was the duty of the defendant as such officer to refuse to deliver said goods and merchandise until said sum had been paid to said common carrier.

Plaintiff further says that thereupon the said Carl Kleve paid to the defendant, and the defendant then and there received, the said sum of $19.57, the freight aforesaid, for the account and benefit of said Cleveland, Columbus, Cincinnati & Indianapolis Railroad Company, and the defendant then and there caused to be delivered the said goods and merchandise to the said Carl Kleve without notice to railroad company, whereby its lien for said freight was lost.

The plaintiff says that the said defendant, though often requested, has not paid said sum of $19.57, nor any part thereof, to the said Cleveland, Columbus, Cincinnati & Indianapolis Railroad Company,
nor to this plaintiff; but said sum, with interest from Septem-
53 ber 8th, 1881, is now due and unpaid from the defendant to this plaintiff.

29. The plaintiff further says that as such common carrier so designated the Cleveland, Columbus, Cincinnati & Indianapolis Railroad Company transported divers cases of dutiable goods in the manner and as provided in said act, to wit, on 9th day of July, 1881, one package consigned to J. Longworth, upon which the freight and charges due said company amounted to the sum of $52.42, and said goods were received in Cincinnati and placed in the custody and control of the defendant as such officer of the United States as aforesaid, who was duly notified in writing of a lien of said carrier for freight upon said goods and merchandise as provided in said act.

The plaintiff further says that it became and was the duty of the defendant as such officer to refuse to deliver said goods and merchandise until said sum had been paid to said common carrier.

Plaintiff further says that thereupon the said J. Longworth paid to the defendant, and the defendant then and there received, the said sum of $52.42, the freight aforesaid, for the account and benefit of the said Cleveland, Columbus, Cincinnati & Indianapolis Railroad Company, and the defendant then and there caused to be delivered the said goods and merchandise to the said J. Longworth
without notice to the said railroad company, whereby its
54 lien for said freight was lost.

The plaintiff says that the said defendant, though often requested, has not paid the said sum of $52.42, nor any part thereof, to the said Cleveland, Columbus, Cincinnati & Indianapolis Railroad Company, nor to this plaintiff; but said sum, with interest from September 8th, 1881, is now due and unpaid from the defendant to this plaintiff.

30. The plaintiff further says that as such common carrier so designated the Cleveland, Columbus, Cincinnati & Indianapolis

Railroad Company transported divers cases of dutiable goods in the manner and as provided in said act, to wit, between the 6th day of June and the 6th day of September, 1881, fourteen packages consigned to J. W. Luhn & Co., a firm doing business in [the] city of Cincinnati, Ohio, upon which the freight and charges amounted to the sum of $175.58, and said goods were received in Cincinnati and placed in the custody and control of the defendant as such officer of the United States as aforesaid, who was notified in writing of a lien of said carrier for freight upon said goods and merchandise *and* provided in said act.

The plaintiff further says that it became and was the duty of the defendant as such officer to refuse to deliver said goods and
55 merchandise until said sum had been paid to said common carrier.

Plaintiff further says that thereupon the said J. W. Luhn & Co. paid to the defendant, and the defendant then and there received, the said sum of $175.58, the freight aforesaid, for the account and benefit of the said Cleveland, Columbus, Cincinnati & Indianapolis Railroad Company, and the defendant then and there caused to be delivered the said goods and merchandise to the said J. W. Luhn & Co. without notice to said railroad company, whereby its lien for said freight was lost.

The plaintiff says that the said defendant, though often requested, has not paid the said sum of $175.58, nor any part thereof, to the said Cleveland, Columbus, Cincinnati & Indianapolis Railroad Company, nor to this plaintiff; but this sum, with interest from September 8th, 1881, is now due and unpaid from the defendant to this plaintiff.

31. The plaintiff further says that as such common carrier so designated the Cleveland, Columbus, Cincinnati and Indianapolis Railroad Company transported divers cases of dutiable goods in the manner and as provided in said act, to wit, on the 6th day of July, 1881, five packages consigned to J. Lange & Bro., a firm doing
56 business in [the] city of Cincinnati, Ohio, upon which the freight and charges due said company amounted to the sum of $39.41, and said goods were received in Cincinnati and placed in the custody and control of the defendant as such officer of the United States as aforesaid, who was duly notified in writing of a lien of said carrier for freight upon said goods and merchandise as provided in said act.

The plaintiff further says that it became and was the duty of the defendant as such officer to refuse to deliver said goods and merchandise until said sum had been paid to said common carrier.

Plaintiff further says that thereupon the said J. Lange & Bro. paid to the defendant, and the defendant then and there received, the said sum of $39.41, the freight aforesaid, for the account and benefit of the said Cleveland, Columbus, Cincinnati and Indianapolis Railroad Company, and the defendant then and there caused to be delivered the said goods and merchandise to the said J. Lange & Bro. without notice to the said railroad company, whereby its lien for said freight was lost.

The plaintiff says that the said defendant, though often requested, has not paid the said sum of $39.41, nor any part thereof, to
57 the said Cleveland, Columbus, Cincinnati and Indianapolis Railroad Company, nor to this plaintiff; but said sum, with interest from September 8th, 1881, is now due and unpaid from the defendant to this plaintiff.

32. The plaintiff further says that as such common carrier so designated the Cleveland, Columbus, Cincinnati and Indianapolis Railroad Company tranported divers cases of dutiable goods in the manner and as provided in said act, to wit, on 17th day of August, 1881, two (2) packages consigned to the Miami Medical College, in [the] city of Cincinnati, Ohio, upon which the freight and charges amounted to the sum of $14.52, and said goods were received in Cincinnati and placed in the custody and control of the defendant as such officer of the United States as aforesaid, who was duly notified in writing of a lien of said carrier for freight upon said goods and merchandise as provided in said act.

The plaintiff furthur says that it became and was the duty of the defendant as such officer to refuse to deliver said goods and merchandise until the said sum had been paid to said common carrier.

Plaintiff further says that thereupon the said Miami Medical College paid to the defendant, and the defendant then and there
58 received, the said sum of $14.52, the freight aforesaid, for the account and benefit of said Cleveland, Columbus, Cincinnati & Indianapolis Railroad Company, and the defendant then and there caused to be delivered the said goods and merchandise to the said Miami Medical College without notice to said railroad compady, whereby its lien for said freight was lost.

The plaintiff says that the said defendant, though often requested, has not paid the said sum of $14.52, nor any part thereof, to the said Cleveland, Columbus, Cincinnati & Indianapolis Railroad Company, nor to this plaintiff; but said sum, with interest from September 8th, 1881, is now due and unpaid from the defendant to this plaintiff.

33. The plaintiff further says that as such common carrier so designated the Cleveland, Columbus, Cincinnati & Indianapolis Railroad Company transported divers cases of dutiable goods in the manner and as provided in said act, to wit, on the 29th day of August, 1881, a package consigned to the Methodist Book Concern, in Cincinnati, Ohio, upon which the freight and charges due said company amounted to the sum of $10.23, and said goods were received in Cincinnati and placed in the custody and control of the de-
59 fendant as such officer of the United States as aforesaid, who was notified in writing of a lien of said carrier for freight upon said goods and merchandise *and* provided by said act.

The plaintiff further says that it became the duty of the defendant as such officer to refuse to deliver said goods and merchandise until said sum had been paid to the said common carrier.

Plaintiff further says that thereupon the said Methodist Book Concern paid to the defendant, and the defendant then and there received, the said sum of $10.23, the freight aforesaid, for the account and benefit of the said Cleveland, Columbus, Cincinnati & Indian-

apolis Railroad Company, and the defendant then and there caused to be delivered the said goods and merchandise to the said Methodist Book Concern without notice to said railroad company, whereby its lien for said freight was lost.

The plaintiff says that the said defendant, though often requested, has not paid the said sum of $10.23, nor any part thereof, to the said Cleveland, Columbus, Cincinnati & Indianapolis Railroad Company, nor to this plaintiff; but said sum, with interest from September 8th, 1881, is now due and unpaid from the defendant to this plaintiff.

60 34. The plaintiff further says that as such common carrier so designated the Cleveland, Columbus, Cincinnati & Indianapolis Railroad Company transported divers cases of dutiable goods in the manner and as provided in said act, to wit, between the 30th of July and 9th of August, 1881, nine packages consigned to J. Maguire & Co., a firm doing business in [the] city of Cincinnati, Ohio, upon which the freight and charges due the said company amounted to the sum of $85.88 and said goods were received in Cincinnati and placed in the custody and control of the defendant as such officer of the United States as aforesaid, who was duly notified in writing of a lien of said carrier for freight upon said goods and merchandise as provided in said act.

The plaintiff further says that it became and was the duty of the defendant as such officer to refuse to deliver said goods and merchandise until said sum had been paid to the said common carrier.

Plaintiff further says that thereupon the said J. Maguire & Co. paid defendant, and the defendant then and there received, the said sum of $85.88, the freight aforesaid, for the account and benefit of

61 the said Cleveland, Columbus, Cincinnati and Indianapolis Railroad Company, and the said defendant then and there caused to be delivered the said goods and merchandise to the said J. Maguire & Co. without notice to said railroad company, whereby its lien for said freight was lost.

The plaintiff says that the said defendant, though often requested, has not paid the said sum of $85.88, nor any part thereof, to the said Cleveland, Columbus, Cincinnati & Indianapolis Railroad Company, nor to this plaintiff; but said sum, with interest from September 8th, 1881, is now due and unpaid from the defendant to this plaintiff.

35. The plaintiff further says that as such common carrier so designated the Cleveland, Columbus, Cincinnati & Indianapolis Railroad Company transported divers cases of dutiable goods in the manner and as provided in said act, to wit, between 21st and 30th of August, 1881, four packages consigned to Martin Thieman & Co., a firm doing business in [the] city of Cincinnati, Ohio, upon which the freight and charges due to said company amounted to the sum of $41.35, and said goods were received in Cincinnati and placed in the custody and control of the defendant as such officer of the United States as aforesaid, who was duly notified in writing of a lien of said

62 carrier for freight upon said goods and merchandise as provided in said act.

The plaintiff further says that it became and was the duty of the

defendant as such officer to refuse to deliver said goods and merchandise until said sum had been paid said common carrier.

Plaintiff further says that thereupon the said Martin Thieman & Co. paid to the defendant, and the defendant then and there received, the said sum of $41.35, the freight aforesaid, for the account and benefit of the said Cleveland, Columbus, Cincinnati & Indianapolis Railroad Company, and the defendant then and there caused to be delivered the said goods and merchandise to the said Martin Thieman & Co. without notice to said railroad company, whereby its lien for said freight was lost.

The plaintiff says that the defendant, though often requested, has not paid the said sum of $41.35, nor any part thereof, to the said Cleveland, Columbus, Cincinnati & Indianapolis Railroad Company, nor to this plaintiff; but said sum, with interest from September 8th, 1881, is now due and unpaid from the defendant to this plaintiff.

36. The plaintiff further says that as such common carrier so designated the Cleveland, Columbus, Cincinnati & Indianapolis
63 Railroad Company transported divers cases of dutiable goods in the manner and as provided in said act, to wit, between August 14th and August 30th, 1881, two packages consigned to F. Moorbrink, upon which the freight and charges amounted to the sum of $27.23, and said goods were received in Cincinnati and placed in the custody and control of the defendant as such officer of the United States as aforesaid, who was duly notified in writing of a lien of said carrier for freight upon said goods and merchandise as provided in said act.

The plaintiff further says that it became and was the duty of the defendant as such officer to refuse to deliver said goods and merchandise until said sum had been paid to the said common carrier.

Plaintiff further says that thereupon the said F. Moorbrink paid to the defendant, and the defendant then and there received, the said sum of $27.23, the freight aforesaid, for the account and benefit of the said Cleveland, Columbus, Cincinnati & Indianapolis Railroad Company, and the defendant then and there caused to be delivered the said goods and merchandise to the said F. Moorbrink without notice to said railroad company, whereby its lien for said freight was lost.

The plaintiff says that the said defendant, though often re-
64 quested, has not paid the said sum of 27.23, nor any part thereof, to the said Cleveland, Columbus, Cincinnati & Indianapolis Railroad Company, nor to this plaintiff; but said sum, with interest from September 8th, 1881, is now due and unpaid from the defendant to this plaintiff.

37. The plaintiff further says that as such common carrier so designated the Cleveland, Columbus, Cincinnati & Indianapolis Railroad Company transported divers cases of dutiable goods in the manner and as provided in said act, to wit, on July 5th, 1881, two packages consigned to Marsh & Harwood, a firm doing business in [the] city of Cincinnati, Ohio, upon which the freight and charges due said company amounted to the sum of $109.35, and said goods were received in Cincinnati and placed in the custody and control

of the defendant as such officer of the United States as aforesaid, who was duly notified in writing of a lien of said carrier for freight upon said goods and merchandise *and* provided in said act.

The plaintiff further says that it became and was the duty of the defendant as such officer to refuse to deliver said goods and merchandise until said sum had been paid to said common carrier.

Plaintiff further says that thereupon the said Marsh & Harwood paid to the defendant, and the defendant then and there
65 received, the said sum of $109.35, the freight aforesaid, for the account and benefit of the said Cleveland, Columbus, Cincinnati & Indianapolis Railroad Company, and the defendant then and there caused to be delivered the said goods and merchandise to the said Marsh & Harwood without notice to said railroad company, whereby its lien for said freight was lost.

The plaintiff says that the said defendant, though often requested, has not paid the said sum of $109.35, nor any part thereof, to the said Cleveland, Columbus, Cincinnati & Indianapolis Railroad Company, nor to this plaintiff; but said sum, with interest from September 8th, 1881, is now due and unpaid from the defendant to this plaintiff.

38. The plaintiff further says that as such common carrier so designated the Cleveland, Columbus, Cincinnati & Indianapolis Railroad Company transported divers cases of dutiable goods in the manner and as provided in said act, to wit, on June 8th, 1881, twenty-five packages consigned to Mohr & Mohr Company, a corporation under the laws of Ohio, upon which the freight and charges due said company amounted to the sum of $56.74, and said goods were received in Cincinnati and placed in the custody and
66 control of the defendant as such officer of the United States as aforesaid, who was duly notified in writing of a lien of said carrier for freight upon said goods and merchandise as provided in said act.

The plaintiff says that it became and was the duty of the defendant as such officer to refuse to deliver said goods and merchandise until said sum had been paid to said common carrier.

Plaintiff further says that thereupon the said Mohr & Mohr Co. paid to the defendant, and the defendant then and there received, the said sum of $56.74, the freight aforesaid, for the account and benefit of the said Cleveland, Columbus, Cincinnati & Indianapolis Railroad Company, and the defendant then and there caused to be delivered the said goods and merchandise to the said Mohr & Mohr Co. without notice to said railroad company, whereby its lien for said freight was lost.

The plaintiff says that the said defendant, though often requested, has not paid the said sum of $56.74, nor any part thereof, to the said Cleveland, Columbus, Cincinnati & Indianapolis Railroad Company, nor to this plaintiff; but said sum, with interest from September 8th, 1881, is now due and unpaid from the defendant to this plaintiff.

67 39. The plaintiff further says that as such common carrier so designated the Cleveland, Columbus, Cincinnati & Indian-

apolis Railroad Company transported divers cases of dutiable goods in the manner and as provided in said act, to wit, on October 27th, 1878, one package consigned O. S. Mildner, upon which the freight and charges due said company amounted to the sum of $89.79, and said goods were received in Cincinnati and placed in the custody and control of the defendant as such officer of the United States as aforesaid, who was duly notified in writing of a lien of said carrier for freight upon said goods and merchandise and provided in said act.

The plaintiff further says that it became and was the duty of the defendant as such officer to refuse to deliver said goods and merchandise until said sum had been paid to said common carrier.

Plaintiff further says that thereupon the said O. S. Mildner paid to the defendant, and the defendant then and there received, the said sum of $89.79, the freight aforesaid, for the account and benefit of the said Cleveland, Columbus, Cincinnati and Indianapolis Railroad Company, and the defendant then and there caused to be delivered the said goods and merchandise to the said O. S. Mildner
68 without notice to said railroad company, whereby its lien on said freight was lost.

The plaintiff says that the said defendant, though often requested, has not paid the said sum of $89.77, nor any part thereof, to the said Cleveland, Columbus, Cincinnati & Indianapolis Railroad Company, nor to this plaintiff; but said sum, with interest from September 8th, 1881, is now due and unpaid from the defendant to this plaintiff.

40. The plaintiff further says that as such common carrier so designated the Cleveland, Columbus, Cincinnati & Indianapolis Railroad Company transported divers cases of dutiable goods in the manner and as provided in said act, to wit, on 29th October, 1881, two packages consigned to G. F. Otte & Co., a firm doing business in [the] city of Cincinnati, Ohio, upon which the freight and charges due said company amounted to the sum of $4.92, and said goods were received in Cincinnati and placed in the custody and control of the defendant, as such officer of the United States as aforesaid, who was duly notified in writing of a lien of said carrier for freight upon said goods and merchandise and provided in said act.

The plaintiff further says that it became and was the duty
69 of the defendant as such officer to refuse to deliver said goods and merchandise until said sum had been paid to said common carrier.

Plaintiff further says that thereupon the said G. F. Otte & Co. paid to the defendant, and the defendant then and there received, the said sum of $4.72, the freight aforesaid, for the account and benefit of the said Cleveland, Columbus, Cincinnati and Indianapolis Railroad Company, and the defendant then and there caused to be delivered the said goods and merchandise to said G. F. Otte & Co. without notice to said railroad company, whereby its lien for said freight was lost.

The plaintiff says that the said defendant, though often requested, has not paid the said sum of $4.72, nor any part thereof, to the said

Cleveland, Columbus, Cincinnati & Indianapolis Railroad Company, nor to this plaintiff; but said sum, with interest from September 8th, 1881, is now due and unpaid from the defendant to this plaintiff.

41. The plaintiff further says that as such common carrier so designated the Cleveland, Columbus, Cincinnati & Indianapolis Railroad Company transported divers cases of dutiable goods in the manner and as provided in said act, to wit, on June 6th, 1881,
70 (10) ten packages of goods consigned to Putnam, Hooker & Co., a firm doing business in city of Cincinnati, Ohio, upon which the freight and charges due said company amounted to the sum of $62.55, and said goods were received in Cincinnati and placed in the custody and control of the defendant as such officer of the United States as aforesaid, who was duly notified in writing of a lien of said carrier for freight upon said goods and merchandise and provided in said act.

The plaintiff further says that it became and was the duty of the defendant as such officer to refuse to deliver said goods and merchandise until said sum had been paid to said common carrier.

Plaintiff further says that thereupon the said Putnam, Hooker & Co. paid to the defendant, and the defendant then and there received, the said sum of $62.55, the freight aforesaid, for the account and benefit of the said Cleveland, Columbus, Cincinnati & Indianapolis Railroad Company, and the defendant then and there caused to be delivered the said goods and merchandise to the said Putnam, Hooker & Co. without notice to said railroad company, whereby its lien for said freight was lost.

The plaintiff says that the said defendant, though often re-
71 quested, has not paid the said sum of $62.55, nor any part thereof, to the said Cleveland, Columbus, Cincinnati & Indianapolis Railroad Company, nor to this plaintiff; but said sum, with interest from September 8th, 1881, is now due and upaid from the defendant to this plaintiff.

42. The plaintiff further says that as such common carrier so designated the Cleveland, Columbus, Cincinnati & Indianapolis Railroad Company transported divers cases of dutiable goods in the manner and as provided in said act, to wit, between July 24th and September 6th, 1881, twenty-seven (27) packages consigned to H. & S. Pogue, a firm doing business in [the] city of Cincinnati, Ohio, upon which the freight and charges due said company amounted to the sum of $281.53, and said goods were received in Cincinnati and placed in the custody and control of the defendant as such officer of the United States as aforesaid, who was duly notified in writing of a lien of said carrier for freight upon said goods and merchandise as provided in said act.

The plaintiff further says that it became and was the duty of the defendant as such officer to refuse to deliver said goods and merchandise until said sum had been paid to the said common carrier.

Plaintiff further says that thereupon the said H. & S.
72 Pogue paid to the defendant, and the defendant then and there received, the said sum of $281.53, the freight aforesaid, for the account and benefit of the said Cleveland, Columbus, Cincin-

nati & Indianapolis Railroad Company, and the defendant then and there caused to be delivered the said goods and merchandise to the said H. & S. Pogue without notice to said railroad company, whereby its lien for said freight was lost.

The plaintiff says that the said defendant, though often requested, has not paid the said sum of $281.53, nor any part thereof, to the said Cleveland, Columbus, Cincinnati & Indianapolis Railroad Company, nor to this plaintiff; but said sum, with interest from September 8th, 1881, is now due and unpaid from the defendant to this plaintiff.

43. The plaintiff further says that as such common carrier so designated the Cleveland, Columbus, Cincinnati & Indianapolis Railroad Company transported divers cases of dutiable goods in the manner and as provided in said act, to wit, on August 10th, 1881, eight packages consigned to W. S. Merrill & Co., a firm then doing business in [the] city of Cincinnati, Ohio, upon which the freight and charges due said company amounted to the sum of $32.23, and said goods were received in Cincinnati and placed in the custody
73 and control of the defendant as said officer of the United States as aforesaid, who was duly notified in writing of a lien of said carrier for freight upon said goods and merchandise as provided in said act.

The plaintiff further says that it became and was the duty of the defendant as such officer to refuse to deliver the said goods and merchandise until said sum had been paid to said common carrier.

Plaintiff further says that thereupon the said Wm. S. Merrill & Co. paid to the defendant, and the defendant then and there received, the said sum of $32.23, the freight aforesaid, for the account and benefit of the said Cleveland, Columbus, Cincinnati & Indianapolis Railroad Company, and the defendant then and there caused to be delivered the said goods and merchandise to the said Wm. S. Merrill & Co. without notice to said railroad company, whereby its lien for said freight was lost.

The plaintiff says that said defendant, though often requested, has not paid the said sum of $32.23, nor any part thereof, to the said Cleveland, Columbus, Cincinnati and Indianapolis Railroad Company, nor to this plaintiff; but said sum, with interest from September 8th, 1881, is now due and unpaid from the defendants to this plaintiff.

74 44. The plaintiff further says that as such common carrier so designated the Cleveland, Columbus, Cincinnati & Indianapolis Railroad Company transported divers cases of dutiable goods in the manner and as provided in said act, to wit, between August 22nd and September 4th, 1881, fifty-three packages consigned to J. R. Peebles' Sons, a firm doing business in [the] city of Cincinnati, Ohio, upon which the freight and charges due said company amounted to the sum of $42.33, and said goods were received in Cincinnati and placed in the custody and control of the defendant as such officer of the United States as aforesaid, who was duly notified in writing of a lien of said carrier for freight upon said goods and merchandise *and* provided in said act.

The plaintiff further says that it became and was the duty of the defendant as such officer to refuse to deliver said goods and merchandise until said sum had been paid to said common carrier.

Plaintiff further says that thereupon the said J. R. Peeble's Sons paid to the defendant, and the defendant then and there received, the said sum of $44.33, the freight aforesaid, for the account and benefit of the said Cleveland, Columbus, Cincinnati & Indianapolis Railroad Company, and the defendant then and there
75 caused to be delivered the said goods and merchandise to the said J. R. Peeble's Sons without notice to said railroad company, whereby its lien for said freight was lost.

The plaintiff says that the said defendant, though often requested, has not paid the said sum of $44.33, nor any part thereof, to the said Cleveland, Columbus, Cincinnati — Railroad Company, nor to this plaintiff; but said sum, with interest from September 8th, 1881, is now due and unpaid from the defendant to this plaintiff.

45. The plaintiff further says that as such common carrier so designated the Cleveland, Columbus, Cincinnati & Indianapolis Railroad Company transported divers cases of dutiable goods in the manner and as provided in said act, to wit, on the 29th day of August, 1881, a package consigned to Palm Bros. & Co., a firm doing business in [the] city of Cincinnati, Ohio, upon which the freight and charges due said company amounted to the sum of $15.00, and said goods were received in Cincinnati and placed in the custody and control of the defendant as such officer of the United States as aforesaid, who was duly notified in writing of a lien of said carrier for freight upon said goods and merchandise as provided in said
76 act.

Plaintiff further says that it became and was the duty of the defendant as such officer to refuse to deliver said goods and merchandise until said sum had been paid to said common carrier.

Plaintiff further says that thereupon the said Palm Bros. & Co. paid to the defendant, and the defendant then and there received, the said sum of $15.54, the freight aforesaid, for the account and benefit of the said Cleveland, Columbus, Cincinnati, & Indianapolis Railroad Company, and the defendant then and there caused to be delivered the said goods and merchandise to the said Palm Bros. & Co. without notice to said railroad company, whereby its lien for said freight was lost.

The plaintiff says that the said defendant, though often requested, has not paid the said sum of $15.54, nor any part thereof, to the said Cleveland, Columbus, Cincinnati and Indianapolis Railroad Company, nor to this plaintiff; but said sum, with interest from September 8th, 1881, is now due and unpaid from the defendant to this plaintiff.

46. The plaintiff further says that as such common carrier so designated the Cleveland, Columbus, Cincinnati & Indianapolis Railroad Company transported divers cases of dutiable goods in the
77 manner and as provided in said act, to wit, between June 8th and August 19th, 1881, five packages consigned to Augustus Messel, upon which the freight and charges due said company

amounted to the sum of $445.03, and said goods were received in Cincinnati and placed in the custody and control of the defendant as such officer of the United States as aforesaid, who was duly notified in writing of a lien of said carrier for freight upon said goods and merchandise as provided in said act.

The plaintiff further says that it became and was the duty of the defendant as such officer to refuse to deliver said goods and merchandise until said sum had been paid to said common carrier.

Plaintiff further says that thereupon the said A. Messel paid the defendant, and the defendant then and there received, the said sum of $445.03, the freight aforesaid, for the account and benefit of the said Cleveland, Columbus, Cincinnati & Indianapolis Railroad Company, and the defendant then and there caused to be delivered the goods and merchandise to the said A. Messel without notice to said railroad company, whereby its lien for said freight was lost.

78 The plaintiff says that the said defendant, though often requested, has not paid the said sum of $445.03, nor any part thereof, to the said Cleveland, Columbus, Cincinnati & Indianapolis Railroad [Company], nor to this plaintiff; but said sum, with interest from September 8th, 1881, is now due and unpaid from the defendant to this plaintiff.

47. The plaintiff further says that as such common carrier so designated the Cleveland, Columbus, Cincinnati & Indianapolis Railroad Company transported divers cases of dutiable goods in the manner and as provided in said act, to wit, on 7th day of June, 1881, sixteen packages consigned to Merril, Verhage & Co., a firm doing business in the city of Cincinnati, Ohio, upon which the freight and charges due the said company amounted to the sum of $85.76, and said goods were received in Cincinnati and placed in the custody and control of the defendant as such officer of the United States as aforesaid, who was duly notified in writing of a lien of said carrier for freight upon said goods and merchandise *and* provided in said act.

79 The plaintiff further says that it became and was the duty of the defendant as such officer to refuse to deliver the said goods and merchandise until said sum had been paid to the said common carrier.

The plaintiff further says that thereupon the said Merrie, Verhage & Co. paid to the defendant, and the defendant then and there received, the said sum of $85.76, the freight aforesaid, for the account and benefit of the Cleveland, Columbus, Cincinnati & Indianapolis Railroad Company, and the defendant then and there caused to be delivered the said goods and merchandise to the said Merrie, Verhage & Co. without notice to said railroad company, whereby its lien for said freight was lost.

The plaintiff says that the said defendant, though often requested, has not paid the said sum of $85.76, nor any part thereof, to the said Cleveland, Columbus, Cincinnati & Indianapolis Railroad Company, nor to this plaintiff; but said sum, with interest from September 8th, 1881, is now due and unpaid from the defendant to this plaintiff.

80 The plaintiff further says that as such common carrier so designated the Cleveland, Columbus, Cincinnati & Indianapolis Railroad Company transported divers cases of dutiable goods in the manner and as provided in said act, to wit, between August 1st and 12th, 1881, one hundred and seventy packages consigned to Jo. C. Whetstone, upon which the freight and charges due said company amounted to the sum of $144.29, and said goods were received in Cincinnati and placed in the custody and control of the defendant as such officer of the United States aforesaid, who was duly notified in writing of a lien of said carrier for freight upon said goods and merchandise as provided in said act.

The plaintiff says that it became and was the duty of the defendant as such officer to refuse to deliver the said goods and merchandise until said sum had been paid to said common carrier.

Plaintiff further says that thereupon the said J. C. Whetstone paid to the defendant, and the defendant then and there received, the said sum of $144.29, the freight aforesaid, for the account and benefit of the said Cleveland, Columbus, Cincinnati & Indianapolis
81 Railroad Company, and the defendant then and there caused to be delivered the said goods and merchanise to the said J. C. Whetstone without notice to said railroad company, whereby its lien for said freight was lost.

The plaintiff says that the defendant, though often requested, has not paid the said sum of $144.29, nor any part thereof, to the said Cleveland, Columbus, Cincinnati & Indianapolis Railroad Company, nor to the plaintiff; but said sum, with interest from September 8th, 1881, is now due and unpaid from the defendant to this plaintiff.

The plaintiff further says that as such common carrier so designated the Cleveland, Columbus, Cincinnati & Indianapolis Railroad Company transported divers cases of dutiable goods in the manner and as provided in said act, to wit, on August 2nd, 1881, eight packages of goods consigned to Shipley, Hoover & Co., a firm doing business in [the] city of Cincinnati, Ohio, upon which the freight and charges due said company amounted to the sum of $56.81, and said goods were received in Cincinnati and placed in the custody and control of the defendant as such officer of the United
82 States as aforesaid, who was duly notified in writing of a lien of said carrier for freight upon said goods and merchandise as provided in said act.

The plaintiff further says that it became and was the duty of the defendant as such officer to refuse to deliver said goods and merchandise until said sum had been paid to said common carrier.

Plaintiff further says that thereupon the said Shipley, Hoover & Co. paid to the defendant, and the defendant then and there received, the sum of $56.81, the freight aforesaid, for the account and benefit of the said Cleveland, Columbus, Cincinnati and Indianapolis Railroad Company, and the defendant then and there caused to be delivered the said goods and merchandise to the said Shipley, Hoover & Co. without notice to said railroad company, whereby its lien for said freight was lost.

The plaintiff says that the defendant, though often requested, has

not paid the said sum of $56.81, nor any part thereof, to the said Cleveland, Columbus, Cincinnati & Indianapolis Railroad Company, nor to this plaintiff; but said sum, with interest from September 8th, 1881, is now due and unpaid from the defendant to
83 this plaintiff.

50. The plaintiff further says that as such common carrier so designated the Cleveland, Columbus, Cincinnati & Indianapolis Railroad Company transported divers cases of dutiable goods in the manner and as provided in said act, to wit, on July 26th, 1881, (20) twenty packages consigned to Strauss, Prity & Co., a firm doing business in [the] city of Cincinnati, Ohio, upon which the freight and charges due said company amounted to the sum of $38.09, and said goods were received in Cincinnati and placed in the custody and control of the defendant as such officer of the United States as aforesaid, who was duly notified in writing of a lien of said carrier for freight upon said goods and merchandise *and* provided in said act.

Plaintiff further says that it became and was the duty of the defendant as such officer to refuse to deliver said goods and merchandise until said sum had been paid to said common carrier.

Plaintiff further says that thereupon the said Strauss, Prity & Co. paid to the defendant, and the defendant then and there re-
84 ceived, the said sum of $38.09, the freight aforesaid, for the account and benefit of the said Cleveland, Columbus, Cincinnati & Indianapolis Railroad Company, and the defendant then and there caused to be delivered the said goods and merchandise to the said Strauss, Prity & Co. without notice to said railroad company, whereby its lien for said freight was lost.

The plaintiff further says that the said defendant, though often requested, has not paid the said sum of $38.09, nor any part thereof, to the said Cleveland, Columbus, Cincinnati & Indianapolis Railroad Company, nor to this plaintiff; but said sum, with interest from September 8th, 1881, is now due and unpaid from the defendant to this plaintiff.

51. The plaintiff further says that as such common carrier so designated the Cleveland, Columbus, Cincinnati & Indianapolis Railroad Company transported divers cases of dutiable goods in the manner and as provided in said act, to wit, between the 3rd day of July and the 8th day of September, 1881, (70) seventy packages consigned to John Shillito & Co., a firm doing business in Cincinnati, Ohio, upon which the freight and charges amounted to the
85 sum of $632.27, and said goods were received in Cincinnati and placed in the custody and control of the defendant as such officer of the United States as aforesaid, who was duly notified in writing of a lien of said carrier for freight upon said goods and merchandise *and* provided in said act.

The plaintiff further says that it became and was the duty of the defendant as such officer to refuse to deliver said goods and merchandise until said sum had been paid to said common carrier.

Plaintiff further says that thereupon the said John Shillito & Co. paid to the defendant, and the defendant then and there received, the said sum of $632.27, the freight aforesaid, for the account and

benefit of the said Cleveland, Columbus, Cincinnati & Indianapolis Railroad Company, and the defendant then and there caused to be delived the said goods and merchandise to the said John Shillito & Co. without notice to said railroad company, whereby its lien for said freight was lost.

The plaintiff says that the said defendant, though often requested, has not paid the said sum of $632.27, nor any part thereof,
86 to the said Cleveland, Columbus, Cincinnati and Indianapolis Railroad Company, nor to this plaintiff; but said sum, with interest from September 8th, 1881, is now due and unpaid from the defendant to this plaintiff.

52. The plaintiff further says that as such common carrier so designated the Cleveland, Columbus, Cincinnati & Indianapolis Railroad Company transported divers cases of dutiable goods in the manner and as provided in said act, to wit, between the 8th and 30th of August, 1881, twelve packages consigned to Strobel & Wilkin, a firm doing business in the city of Cincinnati, Ohio, upon which the freight and charges due said company amounted to the sum of $51.96, and said goods were placed in the custody and control of the defendant as such officer of the United States as aforesaid, who was duly notified in writing of a lien of said carrier for freight upon said goods and merchandise *and* provided in said act.

The plaintiff further says that it became and was the duty of the defendant as such officer to refuse to deliver said goods and merchandise until said sum had been paid to said common carrier.

87 Plaintiff further says that thereupon the said Strobel & Wilkin paid to the defendant, and the defendant then and there received the said sum of $51.96, the freight aforesaid, for the account and benefit of the said Cleveland, Columbus, Cincinnati & Indianapolis Railroad Company, and the defendant then and there caused to be delivered the said goods and merchandise to the said Strobel & Wilkin without notice to said railroad company, whereby its lien for said freight was lost.

The plaintiff says that the said defendant, though often requested, has not paid the said sum of $51.96, nor any part thereof, to the said Cleveland, Columbus, Cincinnati & Indianapolis Railroad Company, nor to this plaintiff; but said sum, with interest from September 8th, 1881, is now due and unpaid from the defendant to this plaintiff.

53. The plaintiff further says that as such common carrier so designated the Cleveland, Columbus, Cincinnati & Indianapolis Railroad Company transported divers cases of dutiable goods in the manner and as provided in said act, to wit, between July 18th and
88 August 3rd, 1881, (42) forty-two packages consigned to Schmidlapp & Co., a firm doing business in [the] city of Cincinnati, Ohio, upon which the freight and charges due said company amounted to the sum of $121.09, and said goods were received in Cincinnati and placed in the custody and control of the defendant as such officer of the United States as aforesaid, who was duly notified in writing of a lien of said carrier for freight upon said goods and merchandise as provided in said act.

The plaintiff further says that it became and was the duty of the defendant as such officer to refuse to deliver said goods and merchandise until said sum had been paid to said common carrier.

Plaintiff further says that thereupon the said Schmidlapp & Co. paid to the defendant, and the defendant then and there received, the said sum of $121.09, the freight aforesaid, for the account and benefit of the said Cleveland, Columbus, Cincinnati and Indianapolis Railroad Company, and the defendants then and there caused to be delivered the said goods and merchandise to the said
89 Schmidlapp & Co. without notice to said railroad company, whereby its lien for said property was lost.

The plaintiff says that the defendant, though often requested, has not paid the said sum of $121.09, nor any part thereof, to the said Cleveland, Columbus, Cincinnati & Indianapolis Railroad Company, nor to this plaintiff; but said sum, with interest from September 8th, 1881, is now due and unpaid from the defendant to this plaintiff.

54. The plaintiff further says that as such common carrier so designated the Cleveland, Columbus, Cincinnati & Indianapolis Railroad Company transported divers cases of dutiable goods in the manner and as provided in said act, to wit, between June 2nd and August 18th, 1881, seven packages consigned to A. Squire & Co., a firm doing business in [the] city of Cincinnati, Ohio, upon which the freight and charges due said company amounted to the sum of $102.41, and said goods were received in Cincinnati and placed in the custody and control of the defendant as such officer of the United States as aforesaid, who was duly notified in writing of a lien
90 of said carrier for freight upon said goods and merchandise as provided in said act.

Plaintiff further says that it became and was the duty of the defendant as such officer to refuse to deliver said goods and merchandise until said sum had been paid to the said common carrier.

Plaintiff further says that thereupon the said A. Squire & Co. paid to the defendant, and the defendant then and there received, the said sum of $102.41, the freight aforesaid, for the account and benefit of the said Cleveland, Columbus, Cincinnati & Indianapolis Railroad Company, and the defendant then and there caused to be delivered the said goods and merchandise to the said A. Squire & Co. without notice to said railroad company, whereby its lien for said freight was lost.

The plaintiff says that the defendant, though often requested, has not paid the said sum of $102.41, nor any part thereof, to the said Cleveland, Columbus, Cincinnati & Indianapolis Railroad Company, nor to this plaintiff; but said sum, with interest from Septem-
91 ber 8th, 1881, is now due and unpaid from the defendant to this plaintiff.

55. The plaintiff says that as such common carrier so designated the Cleveland, Columbus, Cincinnati & Indianapolis Railroad Company transported divers cases of dutiable goods in the manner and as provided in said act, to wit, on August 19th, 1881, three packages of goods consigned to J. McArdle, upon which the freight and charges

due said company amounted to the sum of $30.35, and said goods were received in Cincinnati and placed in the custody and control of the defendant as such officer of the United States as aforesaid, who was duly notified in writing of a lien of said carrier for freight upon said goods and merchandise as provided in said act.

The plaintiff further says that it became and was the duty of the defendant as such officer to refuse to deliver said goods and merchandise until said sum had been paid to the said common carrier.

92 Plaintiff further says that thereupon the said J. McArdle paid to the defendant, and the defendant then and there received, the said sum of $30.35, the freight aforesaid, for the account and benefit of the said Cleveland, Columbus, Cincinnati & Indianapolis Railroad Company, and the defendant then and there caused to be delivered the said goods and merchandise to the said J. McArdle without notice to said railroad company, whereby its lien for said freight was lost.

The plaintiff says that the said defendant, though often requested, has not paid the said sum of $30.35, nor any part thereof, to the said Cleveland, Columbus, Cincinnati & Indianapolis Railroad Company, nor to this plaintiff; but said sum, with interest from September 8th, 1881, is now due and unpaid from the defendant to this plaintiff.

56. The plaintiff further says that as such common carrier so designated the Cleveland, Columbus, Cincinnati & Indianapolis Railroad Company transported diverse cases of dutiable goods in

93 the manner and as provided in said act, to wit, on August 29th, 1881, one package consigned to Max Weil & Co., a firm doing business in [the] city of Cincinnati, Ohio, upon which the freight and charges due said company amounted to the sum of $6.00, and said goods were received in Cincinnati and placed in the custody and control of the defendant as such officer of the United States as aforesaid, who was duly notified in writing of a lien of said carrier for freight upon said goods and merchandise as provided in said act.

The plaintiff further says that it became and was the duty of the defendant as such officer to refuse to deliver said goods and merchandise until said sum had been paid to said common carrier.

The plaintiff further says that thereupon the said Max Weil & Co. paid to the defendant, and the defendant then and there received, the said sum of $6.00, the freight aforesaid, for the account and benefit of the said Cleveland, Columbus, Cincinnati & Indianapolis Railroad Company, and the defendant then and there caused to be delivered the said goods and merchandise to said Max Weil

94 & Co. without notice to said railroad company, whereby its lien for said freight was lost.

The plaintiff says that the said defendant, though often requested, has not paid the said sum of $6.00, nor any part thereof, to the said Cleveland, Columbus, Cincinnati and Indianapolis Railroad Company, nor to this plaintiff; but said sum, with interest from September 8th, 1881, is now due and unpaid from the defendant to this plaintiff.

57. The plaintiff further says that as such common carrier so

designated the Cleveland, Columbus, Cincinnati & Indianapolis Railroad Company transported divers cases of dutiable goods in the manner and as provided in the said act, to wit, on 2nd August, 1881, forty-two (42) packages consigned to H. B. Rattermann, upon which the freight and charges due said company amounted to the sum of $81.36, and said goods were received in Cincinnati and placed in the custody and control of the defendant as such officer of the United States as aforesaid, who was duly notified in writing
95 of a lien of said carrier upon said goods and merchandise *and* provided in said act.

The plaintiff further says that it became and was the duty of the defendant as such officer to refuse to deliver said goods and merchandise until said sum had been paid to the said common carrier.

Plaintiff further says that thereupon the said A. B. Rattermann paid to the defendant, and the defendant then and there received, the said sum of $81.36, the freight aforesaid, for the account and benefit of the said Cleveland, Columbus, Cincinnati & Indianapolis Railroad Company, and the defendant then and there caused to be delivered the said goods and merchandise to the said A. B. Ratterman without notice to said railroad company, whereby its lien on said freight was lost.

The plaintiff says that the said defendant, though often requested, has not paid the said sum of $81.36, nor any part thereof, to the said Cleveland, Columbus, Cincinnati & Indianapolis Railroad Company, nor to this plaintiff; but said sum, with interest from September 8th, 1881, is now due and unpaid from the defendant to
96 this plaintiff.

58. The plaintiff further says that as such common carrier so designated the Cleveland, Columbus, Cincinnati & Indianapolis Railroad Company transported divers cases of dutiable goods in the manner and as provided in said act, to wit, between July 15th and September 1st, 1881, twenty-one packages consigned to H. F. West, Bro. & Co., a firm doing business in Cincinnati, Ohio, upon which the freight and charges due said company amounted to the sum of $208.86, and said goods were received in Cincinnati and placed in the custody and control of the said defendant as such officer of the United States as aforesaid, who was duly notified in writing of a lien of said carrier for freight upon said goods and merchandise as provided in said act.

The plaintiff further says that it became and was the duty of the defendant as such officer to refuse to deliver the said goods and merchandise until said sum had been paid to said common carrier.

97 Plaintiff further says that thereupon the said H. F. West, Bro. & Co. paid to the defendant, and the defendant then and there received, the said sum of $208.86, the freight aforesaid, for the account and benefit of the said Cleveland, Columbus, Cincinnati & Indianapolis Railroad Company, and the defendant then and there caused to be delivered the said goods and merchandise to the said H. F. West, Bro. & Co. without notice to said railroad company, whereby its lien for said freight was lost.

The plaintiff says that the said defendant, though often requested, has not paid the said sum of $208.86, nor any part thereof, to the said Cleveland, Columbus, Cincinnati & Indianapolis Railroad Company, nor to this plaintiff; but said sum, with interest from September 8th, 1881, is now due and unpaid from the defendant to this plaintiff.

Plaintiff therefore prays judgment against the said defendant in the sum of eight thousand four hundred and seventy-seven & 98 $\frac{5\,0}{1\,0\,0}$ dollars, and interest on same from 8th day of September, 1881, and for costs herein.

STALLO, KITTREDGE & SHOEMAKER,
For Plaintiff.

STATE OF OHIO, }
Hamilton County, } *ss:*

Charles A. Elliott, being first duly sworn, says he is the freight agent for the Cleveland, Columbus, Cincinnati & Indianapolis Railway Company, the plaintiff in this cause, and that the statements in the foregoing petition are true as he believes.

CHAS. A. ELLIOTT.

Sworn to before me and in my presence — subscribed this 15th day of March, 1882.

[SEAL.]

JOSEPH WILBY,
Notary Public, Ham. Co., Ohio.

Precipe.

Superior Court of Cincinnati.

CLEVELAND, COLUMBUS, CINCINNATI & INDIANAPOLIS RAILWAY CO.
vs.
D. W. MCCLUNG.

To clerk of Hamilton county courts.

Issue summons in above-entitled cause, returnable according 99 to law, in action for recovery of money only; amount claimed $8,477.00, with interest from September 8th, 1881.

STALLO, KITTREDGE & SHOEMAKER,
Att'ys for Plaintiff.

THE STATE OF OHIO, }
Hamilton County, City of Cincinnati, } *ss:*

The superior court of Cincinnati to the sheriff of the county of Hamilton:

You are commanded to notify D. W. McClung, defendant, that he has been sued by the Cleveland, Columbus, Cincinnati and Indianapolis Railway Company, pl'ff, in the superior court of Cincinnati, and that unless he answer by the fifteenth day of April, A. D. 1882, the petition of the said plaintiff against him filed in the clerk's office of said court such petition will be taken as true, and judgment rendered accordingly.

You will make due return of this summons on the 27th day of March, A. D. 1882.

100 Witness my hand and the seal of the said court, at Cincinnati, this 17th day of March, A. D. 1882.

SAMUEL W. RAMP,
Clerk of the Superior Court of Cincinnati,
[SEAL.] By EMIL HOFFMANN, *Deputy.*

Endorsed as follows: Superior court of Cincinnati. Cleveland, Columbus, Cincinnati and Indianapolis Railway Co., plaintiff, against D. W. McClung, defendant.

Summons in action for the recovery of money only. Am't claimed $8,477.00, with interest from the 8th day of September, A. D. 1881, for which judgment will be taken if you fail to answer to 27th day of March, 1882. Stallo, Kittredge & Shoemaker, atty's.

Filed 27th day of March, 1882.

SAMUEL W. RAMP,
Clerk of the Superior Court of Cin'ti.

1882, March 21st. Served the within-named D. W. McClung personally with a true copy of this writ.

SAMUEL BAILEY, JR., *Sheriff,*
By T. E. SCOBEY, *Deputy.*

101 THE STATE OF OHIO, }
Hamilton County, City of Cincinnati, } *ss:*

I, Samuel W. Ramp, clerk of the superior court of Cincinnati, do hereby certify the above and foregoing to be true and correct copies of all process, pleadings, depositions, testimony, and other proceedings in the case No. 37478, wherein The Cleveland, Columbus, Cincinnati and Indianapolis Railway Company is plaintiff and D. W. McClung is defendant, as appears from the files and records now in my office.

In testimony whereof I have hereunto subscribed my name and affixed the seal of said court, at Cincinnati, this 15th day of November, A. D. 1882.

SAMUEL W. RAMP,
Clerk of the Superior Court of Cincinnati,
[SEAL] By HARRY J. ASHTON, *Deputy.*

102 And afterwards, to wit, on the twelfth day of February, in the year of our Lord one thousand eight hundred and eighty-three, came the defendant, by his attorney, and filed in the clerk's office of the court aforesaid his certain answer in this case, which said answer is in the words and figures following, to wit:

Answer.

THE CLEVELAND, COLUMBUS, CINCINNATI & INDIANAPOLIS RAILWAY CO. *vs.* D. W. MCCLUNG. } 3287.

Money.

First. The defendant, D. W. McClung, denies that he was notified in writing or otherwise of a lien of plaintiff for freight upon the goods and merchandise described in the several counts of plaintiff's petition, or that it ever became the duty of defendant to refuse to deliver said goods and merchandise until the freight thereon had been paid to plaintiff.

Second. Defendant further denies that he received for the account or benefit of plaintiff the freight upon the goods and merchandise described in the petition, or any part thereof, and prays that he may be dismissed, with his costs.

CHANNING RICHARDS,
Attorney for Def't.

103 UNITED STATES OF AMERICA, *Southern District of Ohio,* } *ss:*

D. W. McClung, being duly sworn, deposes and says that the allegations in the foregoing answer are true to the best of his knowledge and belief.

D. W. McCLUNG.

Sworn to before me and subscribed in my presence this 10th day of February, A. D. 1883.

[SEAL.] FREDERICK HERTENSTEIN, JR.,
Notary Public, Hamilton County, Ohio.

And afterwards, to wit, on the twelfth day of March, in the year last aforesaid, an entry was made upon the journal of said court in said cause, which said entry is in the words and figures following, to wit:

J'rn'l Entry. Trial Commenced.

THE CLEVELAND, COLUMBUS, CINCINNATI & INDIANAPOLIS RAILWAY CO. *vs.* D. W. MCCLUNG. } 3287.

Money.

This day came the parties, by their attorneys; and thereupon, to try the issues joined, a jury being called, came, to wit, Peter Brewer, Thomas Bellonby, A. J. Christopher, W. H. McCurdy, M. E. Morgan, Charles L. Olds, Simeon Taylor, Wm. Thomas, Ambrose
104 J. Trumbo, Philip Turpin, Richard Weaver, and Wm. H. Williams, who were duly empaneled and sworn well and

truly to try the issues joined between the parties, but the evidence not being concluded the court respited the jury until to-morrow morning at ten o'clock, to which time this cause is continued.

And afterwards, to wit, on the fourteenth day of March, in the year last aforesaid, a further entry was made upon the journal of said court in said cause, which said entry is in the words and figures following, to wit:

Entry. Trial Progressed.

THE CLEVELAND, COLUMBUS, CINCINNATI & INDIANAPOLIS RAILWAY CO. *vs.* D. W. MCCLUNG. } 3287.

Money.

This day again came the parties, by their attorneys, and also the jurors heretofore empaneled and sworn herein, but the trial of said cause not being concluded the court respited the jury until Friday morning next at ten o'clock, to which time this cause is continued.

And afterwards, to wit, on the sixteenth day of March, in
105 the year last aforesaid, a further entry was made upon the journal of said court in said cause, which said entry is in the words and figures following, to wit:

J'rn'l Entry. Verdict.

THE CLEVELAND, COLUMBUS, CINCINNATI & INDIANAPOLIS RAILWAY CO. *vs.* D. W. MCCLUNG. } 3287.

Money.

This — again came the parties, by their attorneys, and also the jurors heretofore empaneled and sworn herein, who, having heard the evidence, the argument of counsel, and the charge of the court, do find the issues to be in favor of the defendant.

And afterwards, to wit, on the seventeenth day of March, in the year last aforesaid, came the plaintiff, by its attorneys, and filed in the clerk's office of the court aforesaid a certain motion for a new trial in this case, which said motion is in the words and figures following, to wit:

Motion for a New Trial.

THE CLEVELAND, COLUMBUS, CINCINNATI & INDIANAPOLIS RAILWAY CO. *vs.* D. W. MCCLUNG. } 3287.

Money.

Now comes the defendant and moves the court to set aside
106 the verdict in this case and to award a new trial therein for the reasons following, to wit:

1. First. That the court erred in admitting testimony at the trial of said cause objected to by the plaintiff.
2. Second. That the court erred in refusing to charge as requested by the plaintiff.
3. Third. That the court erred in its instructions to the jury excepted to by the plaintiff.
4. Fourth. That the verdict was not sustained by the evidence in the case.

By STALLO & KITTREDGE,
Attorneys for Plaintiff.

And afterwards, to wit, on the twenty-third day of March, in the year last aforesaid, an entry was made upon the journal of said court in said cause, which said entry is in the words and figures following, to wit:

Journal Entry. Motion for New Trial Overruled.

THE CLEVELAND, COLUMBUS, CINCINNATI & INDIANAPOLIS RAILWAY CO. *vs.* D. W. MCCLUNG. } 3287.

Money.

This cause coming on to be heard upon the motion of plaintiff for a new trial herein, the same is overruled. And there-
107 upon, the defendant praying judgment upon the verdict heretofore rendered herein, it is considered by the court that the defendant go hence without day and recover of plaintiff his costs herein, for which execution is awarded. To all of which the plaintiff then and there excepted, and thereupon the plaintiff presented its bill of exceptions in writing, and asked that the same be signed and allowed and made part of the record in this cause, which is accordingly done.

108 And afterwards, to wit, on the twenty-third day of March, in the year last aforesaid, came the plaintiff, by its attorneys, and filed in the clerk's office of the court aforesaid its certain bill of exceptions in this case, which said bill of exceptions is in the words and figures following, to wit:

Bill of Exceptions.

THE CLEVELAND, COLUMBUS, CINCINNATI & INDIANAPOLIS RAILWAY CO. *vs.* D. W. MCCLUNG. } 3287.

Money.

Be it remembered that at the trial of this case at this term of the court, the jury having been empaneled, the plaintiff, to sustain the issue on its part, offered in evidence tending to prove that the defendant was at the several times stated in the petition the surveyor

of the port of Cincinnati and the collector of customs under the laws of the United States, and that the plaintiff was a carrier of bonded goods, properly designated and qualified as such under the act of Congress entitled "An act to amend the statutes in relation to immediate transportation of dutiable goods, and for other purposes," passed June tenth, 1880, and as such was authorized to transport dutiable goods under and in pursuance of the said act, and that as such carrier so authorized the plaintiff transferred dutiable
109 goods, being the goods in the petition mentioned, from the port or ports at which they first arrived to the port of Cincinnati, and that the freights mentioned in the several counts of the petition for the carriage of said goods were due to it, and a lien on said goods and merchandise, and that said goods and merchandise were, upon their arrival in this city, placed in the defendant's custody and under his control as collector and surveyor of the port of Cincinnati, and that the plaintiff duly notified the defendant in writing upon the arrival of said goods of the existence of its lien for freight thereon for transporting the same, as provided by said act, the said freights being the sums named in the several counts of the plaintiff's petition.

Plaintiff offered further evidence tending to prove that the defendant was appointed and qualified as surveyor of the port on the 18th of March, 1881, and entered upon his duties as such at that date, and that one J. L. Wartman was employed by the defendant, with the approval of the Secretary of the Treasury, as deputy collector of customs at this port from the date when the defendant became the surveyor of the port and the collector of customs until Sept. 8th, 1881; that the said J. L. Wartman, as such deputy, acted as
110 cashier of the defendant, and had charge under the defendant of the collection of the customs payable at this port, and of the delivery of imported merchandise to the consignees thereof.

And further tending to prove that it had been the general usage and custom prevailing at the custom office of Cincinnati for ten years prior to the appointment of the defendant, and was the general usage and custom at the said office after the defendant's appointment on March 18th, 1881, and down to the 8th of September, 1881, for the consignees of imported goods brought to the port of Cincinnati by all the common carriers who are authorized under said act to transport imported merchandise to the port of its destination, to pay the freights due to such common carrier at the office of the collector and of the cashier deputy of the surveyor of the port when a similar notice in writing of the existence of a lien thereon in favor of the carrier had been given to the deputy collector at such office, and that such payments were exacted and required by the deputy collector as a precedent condition to the delivery of such goods by the surveyor of the port to the owners and consignees thereof, and that such freights were paid, together with the duties due upon such imported goods, to such deputy collector,
111 sometimes in money, but most generally in checks, which included duties due to the Government and the freights due for the carriage of said goods, and which checks were drawn by the

consignees in favor of the surveyor of the port by name, or of the "collector" or "surveyor" of customs at the port of Cincinnati, which checks were indorsed and collected by such deputy collector for the collector or surveyor in his official capacity, and were collected in the usual course of business by such deputy collector, and that upon the receipt of such money or checks in payment of duties and freight the goods were, by the order of said deputy, with the acquiescence of the surveyor of the port, delivered to the respective consignees, and that the deputy collector, in his official capacity, accounted with and paid over the freights so collected to the common carrier of such imported goods from time to time as the same were demanded.

And further tending to prove that the usage and custom as aforesaid had continued during the whole term of the defendant's office as surveyor of the port, from the 18th day of March, 1881, to the 8th day of Sept., 1881, and that during said term the goods and merchandise mentioned in the several counts of the plaintiff's
112 petition came into the possession of the defendant as such officer, and that said J. L. Wartman, as deputy collector, required of the owners and consignees of said goods the payment of said freights, together with the duties due on said goods, and exacted and required such payment as a precedent condition to the delivery of such goods to the owners and consignees thereof; and that the owners and consignees thereof paid to J. L. Wartman, as deputy, sometime- in money, but generally in checks, the duties due to the Government, and the freights due to the plaintiff, mentioned in the petition for the transportation of such goods, which checks were drawn by the consignees of such goods in favor of and to the order of J. W. McClung, collector, or to the order of the surveyor of customs of the port of Cincinnati, and were endorsed by the said J. C. Wartman in his official capacity, and collected in the usual course of business; and upon such payment of the duties and freights on said goods and merchandise they were, by order of said deputy, with the acquiescence of the defendant, delivered to the respective consignees thereof, and that neither the defendant -or his deputy gave any notice to the plaintiff before delivering such goods and merchandise to the consignees thereof; and that no part of the said freights so collected have been paid to the defendant or
113 his deputies, or otherwise.

And tending to prove that said goods arrived at Cincinnati and the freights were paid by the consignees, as aforesaid, between the first day of July and the eighth day of September, 1881.

And thereupon the defendant called by his counsel the said D. W. McCLUNG, the defendant, in his own behalf, who testified as follows:

Q. Are you the defendant in this case?

A. Yes, sir.

Q. When did you become surveyor of this port?

A. On the 18th day of March, 1881, I took possession of the office.

Q. Who was J. L. Wartman and what were his duties in the office?

A. The general duties of a deputy in the office; he was acting as cashier when I came into the office and continued to act in that capacity, and he attended to the receipt of duties.

And thereupon the defendant asked the witness the following question:

Q. I will ask you if Wartman had ever any authority from you to indorse any checks?

To which question the plaintiff, by his counsel, objected, and the court overruled the objection; to which ruling the plaintiff excepted, and the witness answered as follows:

A. I never authorized him to sign a check.

114 And the defendant asked the further question:

Q. Were you aware that he, Wartman, ever did indorse checks for you or in your name?

To which question the plaintiff by his counsel, objected, which objection was overruled, and the plaintiff excepted to said ruling.

A. I was not aware that he did and supposed it never had been done.

And the defendant asked the further question:

Q. I will ask you when you first saw any of these bills, claimed to be notices of a lien for freight, in favor of the plaintiff, upon the goods mentioned in them? (Such goods being the goods described in the petition.)

To which question the plaintiff, by his counsel, objected, and the court overruled the objection; to which ruling of the court the plaintiff excepted, and the witness answered as follows:

A. I think on the 6th of September was the first time I ever saw any bills of this kind in the office.

And the defendant asked the witness the following question:

Q. I want to know when you first knew that Wartman was receiving freight money from the consignees of the imported goods?

115 To which question the plaintiff objected, and the court overruled the objection; to which ruling of the court the plaintiff excepted, and the witness answered as follows:

A. On Saturday, the 6th of September of that year, 1881.

And the defendant asked the witness the further question:

Q. I will ask you if there was any account for moneys received for freights in the office?

To which question the plaintiff, by his counsel, objected, and the court overruled said objection, and the defendant excepted and the plaintiff answered:

A. There was not.

And the defendant asked the further question:

Q. I will ask you if any of these checks were ever deposited to any account of yours?

To which question the plaintiff objected, and the court overruled the objection, and the plaintiff excepted to said ruling, and the witness answered as follows:

A. They could not have been. I kept my account with the United States Treasury, and checks were not deposited there.

And the defendant asked the further question:

Q. Who made the deposits for your office?

And witness answered as follows:

116 A. The assistant cashier. I examined the accounts myself.

And the plaintiff asked the court that the following special charge be given to the jury:

Special Charge Asked by Plaintiff.

If the jury find under the instructions of the court that the defendant as the surveyor of customs received the imported goods described in the petition, and that he recived notice in writing from the defendant of the existence of a lien for freight upon the goods in favor of the plaintiff, then the defendant under the act of Congress became the bailee for the plaintiff of the goods in question to the extent of the plaintiff's lien; and if upon or after the payment of the duties the defendant delivered the goods to the consignee thereof without giving any notice to the plaintiff, but upon the payment to his, defendant's, deputy by the consignees of the amount of the freight due thereon, he thereby became liable to the plaintiff for the amount of such freight not exceeding the value of the goods.

Which charge the court refused to give, to which refusal to so charge the plaintiff excepted.

And the court charged the jury as follows:

117 "Whether these writings (the notices of its lien offered in evidence by plaintiff) are or are not *per se* such notice as is prescribed by the statute is a question of law to be decided by the court.

"This and the other legal question as to how far the defendant is responsible for the acts of his deputy it is not necessary to decide in this case. In order to authorize a recovery against the defendant for failing to give the seasonable notice to the plaintiff required by the statute before delivering the goods to the owners or consignees an averment that the freights due plaintiff and for which it had a lien were owning and unpaid is necessary. There is no such averment in the plaintiff's petition in this case; on the contrary, it distinctly avers that the consignees did pay the freights to the defendant, and while it does not say in express terms that it authorized such payments to be made by demanding and suing for the same as it has

done ratifies and confirms the payments, and claims that the money was received for its account and benefit, and demands judgment therefor. This is in fact the *gravamen* of its complaint, the
118 theory upon which its suit rests, and the court instructs that you are here to try this case upon the hypothesis that the freights due from the consignees to the plaintiff for the carriage of the goods in question were paid before the goods were delivered by the defendant to the consignees, and that the defendant was therefore under no legal duty to give the plaintiff notice of his intention to make such delivery."

To which instruction of the court the plaintiff then and there excepted.

And the court further charged the jury as follows:

"For the reasons stated there is no necessity to pass upon the question as to the legal sufficiency of the alleged notices from the plaintiff to the defendant of the existence of its lien, or in regard to the extent of the defendant's liability for the acts of his deputy. These questions may all be considered as eliminated from the case."

(To which charge the plaintiff then and there excepted.)

And the court further charged the jury as follows:

"The vital question to be considered is one of fact to be decided by you, to wit: Did the consignees or any one or more of them pay the freights due the plaintiff or any part of it to the defendant
119 for the account and benefit of the plaintiff? If such payments were made the plaintiff is entitled to recover the amount thereof, with interest, in this action. The plaintiff does not contend that such payments were made to the defendant personally. The contention is that they were made to his, the defendant's, deputy, under such circumstances as in legal contemplation make them payments to the defendant. On the other hand, the defendant admits that the payments of the freights were made to and accepted by his deputy, and that the same have not been accounted for and paid by the deputy to the plaintiff, but he denies that he ever authorized his deputy to act for him in the premises, and insists that he is not in law liable to the plaintiff for any part of the freight so collected by his subordinate officer.

Thus the controversy is still further narrowed down to an inquiry as to whether the deputy in the several transactions mentioned acted by express or implied authority as the defendant's agent in the matter *of* under such circumstances as would in law estop the defendant from asserting the contrary."

To which charge the plaintiff then and there excepted.

120 And the court further charged:

"It was competent for the parties by express contract or by tacit understanding, resulting from an established course of business for the benefit and convenience of both parties, to agree that the defendant should receive the freights due the carrier for the account of the latter, and upon receipt thereof deliver the goods to the owners or consignees, and that such receipts by him should be in lieu of the notice which the law required him to give the carrier in the con-

tingency prescribed by the statute. It may be that such tacit or implied agreement existed between these parties in this case. This is the question for you to determine. The defendant was under no official or legal obligation to undertake to thus act for the plaintiff. If he did so he was but acting in his private capacity and not in the discharge of any official duty. It not being an official duty his deputy could not thus act by reason of his official relation to his superior, and the defendant would not be liable for such extra-official action unless he had in some way authorized his deputy so to act, or unless he has so acted as to estop him from denying
121 that the deputy was in the specific matter complained of acting by his authority for him."

(To so much of the above charge as stated that the defendant, if he did so act as stated in the charge, was but acting in his private capacity and not in the discharge of his official duty, and it not being an official duty his deputy could not thus act by reason simply of his official relation to his superior, the plaintiff then and there excepted.)

Charge omitted.

And the court further charged the jury:

"If defendant had knowledge of this custom, acquired from observation, from the business and books of his office, or through other sources, and acquiesced therein and permitted the plaintiff to make its collections through his deputy, in the belief that he was acting for and as his agent, or by his acts or declarations represented or held him out as his agent in the matter, the pl'ff and defendant both understanding and tacitly or otherwise agreeing that the freights due the plaintiff should be paid in this way in lieu of the notice, which the statute in the contingency described required the defendant as collector to give to the plaintiff, he would be liable to the plaintiff for all sums so paid to the deputy for the plaintiff's use."

122 And the court further charged the jury:

"If the deputy acted without authority from the defendant, and the defendant did not know of his said action nor hold him out to the plaintiff as his agent, nor do nor say anything to mislead the plaintiff nor its officers nor agents, nor undertake nor assume to collect plaintiff's freight, he would not be liable to plaintiff's demand, and your verdict ought to be in his favor."

(To which charge the plaintiff then and there excepted.)

And the plaintiff then and there moved the court to set aside the verdict rendered and for a new trial upon the grounds:

1. First. That the court erred in admitting testimony at the trial of said cause objected to by the plaintiff.

2. Second. That the court erred in refusing to charge as requested by the plaintiff.

3. Third. That the court erred in its instructions to the jury excepted to by the plaintiff.

4. Fourth. That the verdict was not sustained by the evidence in the case.

But the court overruled said motion; to which action of the court

the plaintiff excepted, and prayed that this its bill of exceptions
123 might be allowed, signed, and sealed by the court and ordered to be made part of the record in this case, which was done and ordered accordingly.

JNO. BAXTER, [SEAL.]
U. S. Circuit Judge for the 6th Judicial Circuit.

124 And afterwards, to wit, on the 16th day of May, in the year last aforesaid, there was filed in the clerk's office of the court aforesaid a certain assignment of errors in this case, which said assignment of errors is in the words and figures following, to wit:

Assignment of Errors and Prayer for Reversal.

THE CLEVELAND, COLUMBUS, CINCINNATI & INDIANAPOLIS RAILWAY CO.
vs.
D. W. MCCLUNG. } 3287.

Money.

At the October term, in the year of our Lord one thousand eight hundred and eighty-three, on the second Monday of October in said term, before the justices of the United States Supreme Court, at the Capitol in the city of Washington, comes the said The Cleveland, Columbus, Cincinnati and Indianapolis Railway Company, by its attorneys, Stallo & Kittredge, and says that said defendant in error, at the February term, A. D. 1883, of the circuit court of the United States for the southern district of Ohio, recovered a judgment by the consideration of said court against plaintiff in error in a certain action then pending in said court, wherein this plaintiff in error was plaintiff and defendant in error was defendant.

125 Plaintiff in error says further that in the record and proceedings aforesaid there is manifest error to the prejudice of plaintiff in error to this, to wit:

1. The court erred in overruling the motion of said C., C., C. & — R'y Co., plaintiff below, to remand the cause to the superior court of Cincinnati.

2. The court below erred in admitting testimony at the trial to which plaintiff below objected.

3. The court below erred in excluding testimony offered at the trial by plaintiff below.

4. The court below *error* in refusing to charge the jury as requested by plaintiff.

5. The court below erred in its instructions to the jury excepted to by the plaintiff.

6. The court below erred in overruling the motion of plaintiff below to set aside the verdict and for a new trial and in entering judgment for defendant.

To which plaintiff below excepted.

All of which more fully appears in the transcript of the record herewith filed in this cause.

Wherefore the said plaintiff in error prays that the judg-
126 ment aforesaid may be reversed and held for naught, and that it may be returned to all things which it has lost by reason of the premises.

STALLO & KITTREDGE,
Att'ys for Plaintiff in Error.

127 THE UNITED STATES OF AMERICA, *ss:*

To D. W. McClung, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States to be holden at the city of Washington on the second Monday of October next, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States for the southern district of Ohio, wherein the Cleveland, Columbus, Cincinnati and Indianapolis Railway Co. is plaintiff and you are defendant in error, to show cause, if any there be, why the judgment in the said writ of error mentioned should not be corrected and speedy justice be done to the parties in that behalf.

Witness the Honorable Morrison R. Waite, Chief Justice of the said Supreme Court, this 2nd day of June, in the year of our Lord one thousand eight hundred and eighty-three.

JNO. BAXTER, *Judge &c.*

128 [Endorsed:] 6-4-'83. United States circuit court, southern dist. of Ohio. No. 3287. The C., C., C. & I. R. Co. *vs.* D. W. McClung. Citation to defendant in error. Filed June 5th, 1883. Wm. C. Howard, clerk.

Received this writ at Cincinnati, Ohio, June 4, '83, and that same day executed same by delivering a true copy hereof to within-named D. W. McClung at 3 p. m.

Service	2 00
Copy	50
1 mile	06
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LOT WRIGHT,
U. S. M., S. D. O.
T. M. TURNER, *Deputy.*

129 THE UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the judges of the circuit court of the United States for the southern district of Ohio, Greeting:

Because in the record and proceedings and also in the rendition of the judgment of a plea which is in the said circuit court before you, between the Cleveland, Columbus, Cincinnati & Indianapolis Railway Company and D. W. McClung, a manifest error hath happened, to the great damage of the said Cleveland, Columbus, Cin-

cinnati & Indianapolis Railway Co., as by its complaint appears, we, being willing that the error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you may have the same at the city of Washington on the second Monday of October next, in the said Supreme Court to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done to correct that error what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Morrison R. Waite, Chief Justice of the said Supreme Court, the 23d day of June, 1883, in the year of our Lord one thousand eight hundred and eighty-three.

[Seal of the Circuit Court, South'n Dist. of Ohio.]

WM. C. HOWARD,
Clerk of the Circuit Court of the U. S., S. D. O.

130 [Endorsed:] United States circuit court, south. dist. of Ohio. No. 3287. The C., C., C. & I. R. Co. *vs.* D. W. McClung. Writ of error.

131 THE UNITED STATES OF AMERICA, }
Southern District of Ohio, } *ss:*

I, William C. Howard, clerk of the circuit court of the United States for the southern district of Ohio, do hereby certify the foregoing to be a true and correct transcript of the record and proceedings in the case wherein the Cleveland, Columbus, Cincinnati & Indianapolis Railway Company is plaintiff and D. W. McClung is defendant as the same remain on file and of record in this office.

In testimony whereof I have hereunto set my hand and affixed the seal of said court, at Cincinnati, this 5th day of June, A. D. 1883, and in the one hundred and seventh year of the Independence of the United States of America.

[Seal of the Circuit Court, South'n Dist. of Ohio.]

Attest: WM. C. HOWARD,
Clerk U. S. Cir. Crt, S. D. Ohio.

Endorsed on cover: S. Ohio. C. C. U. S. No. 284. The Cleveland, Columbus, Cincinnati and Indianapolis Railway Company, plaintiff in error, *vs.* D. W. McClung. Filed 17th September, 1883.

119-457

Supreme Court U. S.
FILED.
FEB 27 1886
JAMES. H. McKENNEY,
CLERK.

The Supreme Court of the United States.

The Cleveland, Columbus, Cincinnati and Indianapolis Railway Company,

No. 284. — VS. —

D. W. McClung.

ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF OHIO.

Brief for Plaintiff in Error.

E. W. KITTREDGE, with
RAMSEY, MAXWELL & MATTHEWS.
For Plaintiff in Error.

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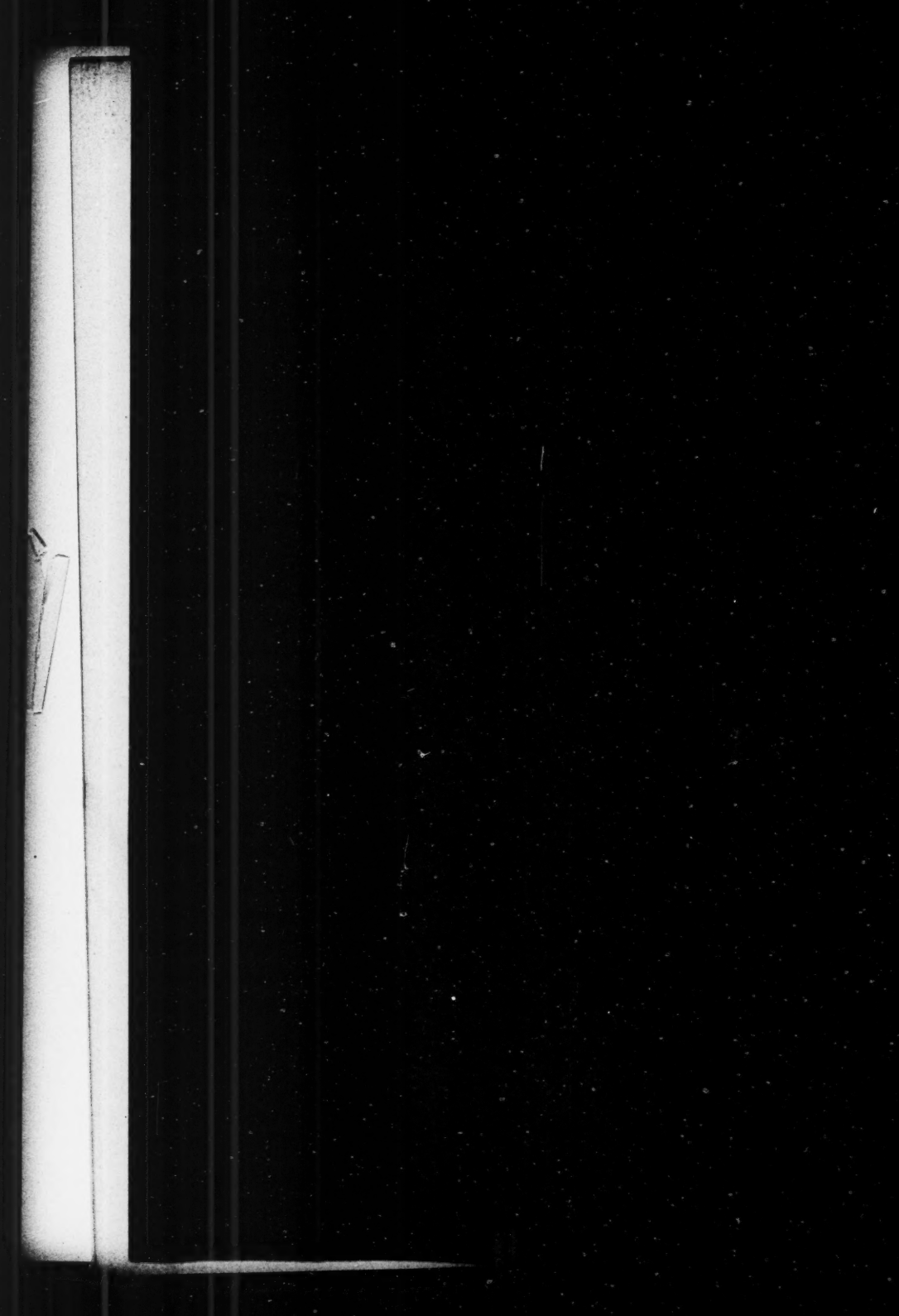

The Supreme Court of the United States.

The Cleveland, Columbus, Cincinnati and Indianapolis Railway Company,

No. 284. — vs. —

D. W. McClung.

ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF OHIO.

Brief for Plaintiff in Error.

STATEMENT OF THE CASE.

This is one of three cases of like character, brought to this Court as a test case to determine the rights of the parties. The action below was commenced by the C. C. C. & I. R. Co. against D. W. McClung, in the Superior Court of Cincinnati, Hamilton County, O., on the 7th day of November, 1882. The plaintiff alleged that it was a corporation and a common carrier of goods for freight, designated by the secretary of the treasury of the United States, for the purpose of receiving and transporting dutiable goods from the port

of arrival to the port of destination, under and as provided in the Act of Congress, passed June 10th, 1880, entitled "An Act to amend the Statutes of the United States in relation to the immediate transportation of dutiable goods, and for other purposes." 21 Stat. L., 173.

By Section 10 of this Act, amending Section 2981 of the Revised Statutes, it is provided, among other things, that whenever the proper officer of the customs shall be duly notified in writing of the existence of the lien for freight upon imported goods in his custody, he shall, before delivering such goods to the importer or consignee, give seasonable notice to the party claiming the lien; and the possession by the officer of the customs shall not effect a discharge of such lien; and such officer may refuse to deliver such merchandise until proof to his satisfaction shall be produced, that the freight thereon has been paid. The section further provides that if the goods shall be forfeited to and sold by the United States, freight thereon due shall be paid from the proceeds of such sales.

The petition further alleged that the plaintiff, D. W. McClung, at the time of the acts complained of, held the office of Collecter of Customs and Surveyor of the Port of Cincinnati. It further alleged that the plaintiff as such common carrier transported divers dutiable goods, described in fifty-eight different paragraphs in the petition, from New York, as the port of arrival, to the City of Cincinnati, where the said goods were received, and placed in the custody and control of the defendant as such officer of the United States, who was duly notified in writing of the lien of the company, as common carriers for freight, upon said goods, as provided in said act, amounting in the aggregate to the sum of $8,477.50, whereupon the petition alleges that it became the

duty of the defendant as such officer to refuse to deliver said goods until such freight thereon had been paid to the plaintiff, as such common carrier.

The petition further alleged that the several owners and consignees of said goods thereupon paid to the defendant, and the defendant then and there received the freight aforesaid, amounting in the aggregate to $8,477.50 for the account and benefit of the said plaintiff, and that the defendant then and thereupon delivered the said goods to the several owners and consignees without notice to the said railroad company, whereby its lien on said freight was lost. The plaintiff alleges that the defendant has failed to pay to the plaintiff the amount of freight, or any part thereof, so received by him. This action is brought to recover the said sum of $8,477.50, with interest from September 8th, 1881, which the petition alleged was due from the defendant to the plaintiff.

After the filing of the petition and the service of the summons upon the defendant, D. W. McClung, on the 7th of November, 1882, he filed his petition, in the Circuit Court of the United States for the Sixth Circuit of the Southern District of Ohio, for the writ of certiorari to the Superior Court of Cincinnati, to have the said cause certified to the Circuit Court. This petition sets forth the commencement of the action in the Superior Court of Cincinnati by the filing of a petition therein, and states the ground of action and prayer of the petition in substance as it is above recited, and represents that at the time of the commencement of the action, and of the acts charged in the petition, the said D. W. McClung was an officer of the United States, to-wit: Surveyor of Customs for the Port of Cincinnati, "*and that all his acts in connection with the receipt and delivery of the merchan-*

dise described in said petition were done by him under color of his said office."

Thereupon the railroad company filed its motion (R., 4) in the Circuit Court of the United States to remand the cause to the Superior Court of Cincinnati, upon the ground that the Circuit Court had no jurisdiction of the persons or the subject matter of the action, which motion upon hearing the Circuit Court overruled, and the railroad company excepted to the ruling in that behalf.

Thereafter D. W. McClung filed his answer in the Circuit Court of the United States (R., 41), containing two defences.

First. A denial that he was notified in writing or otherwise of a lien of plaintiff for freight upon the goods described in the petition, or that it ever became the duty of the defendant to refuse to deliver said goods until the freight thereon had been paid to the plaintiff.

Second. A denial that he received for the account or benefit of the plaintiff the freight or any part thereof, for the goods described in the petition as therein alleged.

Upon these pleadings the case was tried to a jury, and a verdict rendered for the defendant. A motion for a new trial (R., 42) was made and overruled, and a bill of exceptions (R., 43) filed.

By the bill of exceptions it appeared that the plaintiff offered evidence tending to prove that the plaintiff was a carrier of bonded goods properly designated and qualified as such, under the Act of Congress, and as such that it transported the goods in the petition mentioned from the port of arrival to the port of Cincinnati, and that the freights were due upon said goods. That the goods upon their arrival

were placed in the said defendant's custody, as Collector of the Port of Cincinnati; and that the plaintiff notified him, the defendant, in writing of the existence of its lien for freight thereon as provided by said act.

The plaintiff offered further evidence tending to prove that one J. L. Wartman was employed by the defendant, with the approval of the secretary of the treasury, as Deputy Collector of the Customs at the Port of Cincinnati, and that the said J. L. Wartman as such deputy acted as cashier of defendant, and had charge under the defendant of the collection of the customs payable at the Port of Cincinnati, and of the delivery of imported merchandise to the consignees thereof; and that it had been the general usage and custom prevailing at the custom office of Cincinnati, for ten years prior to the appointment of defendant, and was the general usage and custom at the said office after said defendant's appointment, for the consignees of imported goods brought to the Port of Cincinnati, by all common carriers under the Act of Congress, to pay the freights due to such common carriers at the office of the collector, and to the cashier deputy of the surveyor, when notice in writing of the existence of a lien thereon in favor of the carrier had been given to the deputy collector at such office, and that such payments were exacted and required by said deputy collector as a precedent condition to the delivery of such goods to the owner or consignee thereof; and that the freights were paid, together with the duties upon such imported goods, to such collector, some times in money, but most generally in checks, which included the duties due to the government and the freight for the carriage of the goods, and which checks were drawn by the consignees in favor of the surveyor of the port by name, or of the "collector" or "surveyor" of cus-

dise described in said petition were done by him under color of his said office."

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toms at the port, and which checks were endorsed and collected by said deputy collector for the collector or surveyor in his official capacity, and were collected in the usual course of business by such deputy collector; and that upon the receipt of such payment of duties and freight, the goods were, by the order of said deputy with the acquiescence of the surveyor of the port, delivered to the respective consignees; and that the deputy collector in his official capacity accounted for and paid over the freights so collected to the common carrier of such imported goods from time to time as the same were demanded; and further tending to prove that this usage and custom had continued during the whole term of defendant's office, to-wit: from the 18th day of March, 1881, to the 8th day of September, 1881, and that during said term the goods came into the possession of the defendant as such officer, and that said J. L. Wartman as deputy collector, required of the consignees the payment of said freights, together with the duties due on said goods, and exacted said payments as a precedent condition to the delivery of the goods to the owners and consignees thereof; and that the owners and consignees thereof paid to the said J. L. Wartman, as deputy, sometimes in money, but generally in checks, the duties due to the government, and the freights due to the plaintiff, which checks were drawn by consignees in favor of and to the order of D. W. McClung, Collector, or to the order of the Surveyor of Customs of the Port of Cincinnati, and were endorsed by the said J. L. Wartman in his official capacity and collected in the usual course of business; and upon said payment the goods were by order of the deputy with the acquiescense of the defendant, delivered to the respective consignees thereof, without notice to the plaintiff; and that no part of the freight so collected on the

goods mentioned in the petition had been paid by the defendant to the plaintiff.

And thereupon defendant, as a witness on his own behalf, having testified that J. L. Wartman was his deputy in his office acting as cashier, and attending to the respective duties, was asked the following questions, (R. 46):

"*Q.* I will ask you if Wartman had ever any authority from you to endorse any checks?

To which plaintiff objected and objection being overruled, excepted.

A. I never authorized him to sign a check.

Q. Were you aware that he, Wartman, ever did endorse checks for you or in your name?

To which plaintiff objected, objection overruled and plaintiff excepted.

A. I was not aware that he did, and supposed that it never had been done.

Q. I will ask you when you first saw these bills claimed to be notice of lien for freight in favor of the plaintiff on the goods mentioned in them?

Plaintiff objected; objection overruled and plaintiff excepted.

A. I think on the 6th of September was the first time I ever saw any bills of this kind in the office.

Q. I want to know when you first knew that Wartman was receiving freight money from the consignees of imported goods?

Plaintiff objected; objection overruled and plaintiff excepted.

A. On Saturday, the 6th of September of that year, 1881.

Q. I will ask you if there was any account for moneys received for freights in the office?

Objected to by plaintiffs; objection overruled and exception reserved.

A. There was not.

Q. I will ask you if any of these checks were ever deposited to any account of yours?

Objected to by plaintiffs: objection overruled and exception reserved.

A. They could not have been. I kept my account at

the United States Treasury, and checks were not deposited there.

Q. Who made the deposits for your office?
A. The assistant cashier."

Upon the close of the testimony the plaintiff asked the Court (R., 47) for a special charge as follows:

"If the jury find under the instructions of the Court, that the defendant as surveyor of customs received the imported goods described in the petition, and that he received notice in writing from the defendant of the existence of a lien for freight upon the goods in favor of the plaintiff, then the defendant under the Act of Congress became the bailee for the plaintiff of the goods in question to the extent of the plaintiff's lien; and if upon or after the payment of the duties, the defendant delivered the goods to the consignee thereof without giving any notice to the plaintiff, but upon the payment to his, defendant's, deputy by the consignees, of the amount of the freight due thereon, he thereby became liable to the plaintiff for the amount of such freight not exceeding the value of the goods."

Which charge the Court refused to give, to which refusal to so charge the plaintiff excepted.

And the Court charged the jury as follows, (R. 47:)

"Whether these writings (the notices of its lien offered in evidence by plaintiff) are or are not *per se* such notice as is prescribed by the statute is a question of law to be decided by the Court.

This and the other legal question as to how far the defendant is responsible for the acts of his deputy it is not necessary to decide in this case. In order to authorize a recovery against the defendant for failing to give the seasonable notice to the plaintiff required by the statute before delivering the goods to the owners or consignees, an averment that the freights due plaintiff, and for which it had a lien, were owing and unpaid is necessary. There is no such averment in the plaintiff's petition in this case; on the contrary, it distinctly avers that the consignees did pay the freights to the defendant, and while it does not say in express terms that it authorized such payment to be made, by demanding and sueing for the same as it has done, ratifies and confirms the payments, and claims that the money wa

received for its account and benefit, and demands judgment therefor. This is in fact the gravamen of its complaint, the theory upon which its suit rests, and the Court instructs that you are here to try this case upon the hypothesis that the freights due from the consignees to the plaintiff for the carriage of the goods in question were paid before the goods were delivered by the defendant to the consignees, and that the defendant was therefore under no legal duty to give the plaintiff notice of his intention to make such delivery."

To which instruction of the Court the plaintiff then and there excepted.

And the Court further charged the jury as follows:

"For the reasons stated there is no necessity to pass upon the question as to the legal sufficiency of the alleged notices from the plaintiff to the defendant of the existence of its lien or in regard to the extent of the defendant's liability for the acts of his deputy. These questions may all be considered as eliminated from the case."

To which charge the plaintiff then and there excepted.

And the Court further charged the jury as follows:

"The vital question to be considered is one of fact to be decided by you, to-wit: Did the consignees or any one or more of them pay the freights due the plaintiff or any part of it to the defendant for the account and benefit of the plaintiff? If such payments were made the plaintiff is entitled to recover the amount thereof with interest in this action. The plaintiff does not contend that such payments were made to the defendant personally. The contention is that they were made to his, the defendant's, deputy, under such circumstances as in legal contemplation make them payments to the defendant. On the other hand, the defendant admits that the payments of the freights were made to and accepted by his deputy and that the same have not been accounted for and paid by the deputy to the plaintiff, but he denies that he ever authorized his deputy to act for him in the premises, and insists that he is not in law liable to the plaintiffs for any part of the freight so collected by his subordinate officer.

Thus the controversy is still further narrowed down to an inquiry as to whether the deputy in the several transactions mentioned acted by express or implied authority as the

defendant's agent in the matter or under such circumstances as would in law estop the defendant from asserting the contrary."

To which charge the plaintiff then and there excepted.

And the Court further charged:

"It was competent for the parties by express contract or by a tacit understanding resulting from an established course of business for the benefit and convenience of both parties to agree that the defendant should receive the freights due the carrier for the account of the latter, and upon receipt thereof deliver the goods to the owners or consignees, and that such receipts by him should be in lieu of the notice which the law required him to give the carrier in the contingency described by the statute. It may be that such tacit or implied agreement existed between these parties in this case. This is the question for you to determine. The defendant was under no official or legal obligation to undertake to thus act for the plaintiff. If he did so, he was but acting in his private capacity and not in the discharge of any official duty. It not being an official duty, his deputy could not thus act by reason of his official relations to his superior, and the defendant would not be liable for such extra official action unless he had in some way authorized his deputy so to act, or unless he has so acted as to estop him from denying that the deputy was in the specific matter complained of acting by his authority for him."

To so much of the above charge as stated that the defendant, if he did so act as stated in the charge, was but acting in his private capacity and not in the discharge of his official duty, and it not being an official duty, his deputy could not thus act by reason simply of his official relation to his superior, the plaintiff then and there excepted.

And the Court further charged the jury:

"If defendant had knowledge of this custom acquired from observation, from the business and books of his office or through other sources and acquiesced therein and permitted the plaintiff to make its collections through his deputy in the belief that he was acting for and as his agent or by his acts or declarations represented or held him out as his

agent in the matter, the plaintiff and defendant both understanding and tacitly or otherwise agreeing that the freights due the plaintiff should be paid in this way in lieu of the notice which the statute in the contingency described, required the defendant as collector to give to the plaintiff. he would be liable to the plaintiff for all sums so paid to the deputy for the plaintiff's use."

And the Court further charged the jury:

"If the deputy acted without authority from the defendant, and the defendant did not know of his said action, nor hold him out to the plaintiff as his agent, nor do, nor say anything to mislead the plaintiff nor its officers nor agents, nor undertake nor assume to collect plaintiff's freight he would not be liable to plaintiff's demand and your verdict ought to be in his favor."

To which charge the plaintiff then and there excepted.

The errors assigned. (R., 50) are:

1. That the Court erred in overruling the motion of the railroad company to remand the cause to the Superior Court of Cincinnati.

2. That the Court erred in admitting testimony at the trial to which the plaintiff objected.

4. That the Court erred in refusing to charge the jury as requested by plaintiff.

5. That the Court erred in its instructions to the jury excepted to by plaintiff.

6. That the Court erred in overruling the motion of plaintiff to set aside the verdict and for a new trial.

PROPOSITIONS SUBMITTED.

I.

The original action was against D. W. McClung, individually, and not in his official capacity. That appeared upon the face of the petition filed in the Superior Court of

Cincinnati, and upon the recitals in the petition of D. W. McClung for a writ of certiorari. The further allegation, in his petition for the writ of certiorari, that, (R., 21) "all *his* acts in connection with the receipt and delivery of the merchandise described in said petition were done by him under color of his said office," either included the act of receiving the freight money for the account of the plaintiff, alleged in petition as the gravament of the plaintiff's cause of action, or it did not include that act. The ambiguity contained in this allegation was brought to the attention of the Court upon motion to remand the cause. The averment might be construed as meaning, that all the acts which he, the collector, did in connection with the receipt and delivery of the merchandise, were done by him under color of his office, but with the intention of denying that the act alleged in the petition, to-wit: that the defendant had received money for the account and benefit of the plaintiff, which he had failed to pay to the plaintiff upon demand, was his, the defendant's act. The Court upon the motion to remand held that the proper construction of this allegation of the petition of D. W. McClung, for the removal of the cause, was that all the acts recited to be charged against him be the railway company including the act of collecting and receiving freight money for the account and benefit of plaintiff, were acts done by him under color of his said office. Wherefore the motion to remand the cause was overruled.

But the Court in its charge, on the trial of the cause, after the plaintiff had offered evidence tending to sustain every allegation in its petition, instructed the jury (R., 48) that while it was competent for the parties by express or implied agreement to constitute the defendant the agent of the plaintiff to collect the moneys

in question, that the defendant was under no official or legal obligation to undertake to thus act for the plaintiff, and if he did so, he was acting in his private capacity and not in the discharge of any official duty, and that it not being an official duty, his deputy could not thus act by reason of his official relation to his superior, and the defendant would not be liable for such extra official action unless he had in some way authorized his deputy so to act.

We submit that the defendant, D. W. McClung, removed this cause from the State to the United States Court upon the allegation that the act charged of collecting money for the plaintiff, was done by him under color of his office, and he was either estopped to deny that allegation by the terms of his petition for the removal of the cause, or the Circuit Court erred in refusing to remand the cause, upon the allegations of the petition for its removal.

II.

The charge of the Court (R., 47) that the plaintiff, by bringing this action against D. W. McClung ratified or confirmed the payments of freight by the consignees, whereby the defendant was under no legal duty to give the plaintiff notice of his intention to make delivery of the goods, and under no liability to the plaintiff for the loss of its lien by reason of such delivery, even though the jury should find that the payments thus ratified were never in fact made to the defendant McClung, but were made to Wartman, not as deputy or agent of McClung, but as a third party and stranger to this action, was erroneous.

III.

The deputy collector acting as cashier was by virtue of

his position, and continuous action in the premises, the agent of McClung, who was responsible for his conduct and, under the circumstances disclosed, estopped to deny his agency, wherefore the Court erred in refusing to give the special charge asked for by the plaintiff. (R., 49.)

ARGUMENT.

With the permission of the Court, I shall consider the last proposition, which is of primary importance in the ultimate ascertainment of my client's right, first.

A deputy collector of the customs is provided for by Sec. 2630, Rev. Stat., which declares that "every collector of the customs shall have authority, with the approval of the secretary of the treasury, to employ within his district such number of proper persons as deputy collectors of the customs as he shall deem necessary; and such deputies are declared to be officers of the customs." The same section provides that in case of the necessary absence, etc., of the collector he may exercise his powers and perform his duties by deputy, duly constituted under his hand and seal, "and he shall be answerable for the acts of such deputy in the execution of such trust." Sec. 2632 extends a similar power to naval officers and surveyors to exercise their powers and perform their duties by deputies accompanied by a similar provision that they shall be answerable for the acts of the deputy. Sec. 3148 contains a similar provision for the appointment by the collectors of internal revenue of deputy collectors, and authorizing such collector to require bonds from his deputies and providing expressly that the collector shall in every respect be responsible both to the United States and to individuals, for every act done by any of his deputies.

It was decided by the Supreme Court of Texas, in the case of *Dignan vs. Shields*, 51 Tex., 322, in an action brought by a collector of customs upon a bond exacted by him from a deputy collector, whom he had appointed under the provision of the above Section 2630, that the collector had a right to exact a bond for his security against the defalcation of his deputy, and to designate him for the discharge of the duties of cashier in the collector's office, and that the sureties upon such a bond were liable to the collector for the defalcation of the deputy. This decision proceeds upon the ground that the deputy collector, although constituted and appointed by the collector with the approval of the secretary of the treasury, nevertheless holds his office *de facto* at the will of the collector, that he was not a permanent officer of customs removable only by the secretary of the treasury, and although for many purposes he might be regarded as an officer of the United States, nevertheless he does not belong to the class of subordinate officers whose removal is controlled by customs regulations. But he exercises his office in right of the collector himself who is his principal, the deputy having no authority distinguished from his principal, nor to act otherwise than in his name and upon his, the collector's, responsibility. Wherefore the collector but exercised a legitimate caution in exacting a bond from him for the faithful performance of his duty.

This decision, while it is by a State Court construing the Statutes of the United States as to the powers, duties and liabilities of officers of the United States, seems not to be in conflict with any decision by this Court, and on the contrary, in the case of *Badger, Collector, vs. Gutierez*, 111 U. S., 734, although no such question was directly involved, yet it seems indirectly to countenance the view taken in *Dignan*

vs. Shields. It is recited in the statement of facts in that case that the papers improperly issued to the schooner "Teresa G." were issued by the deputy collector. How the papers, —a coasting license and enrollment—had been improperly issued the case does not state. If the impropriety was such as to make their issue without the official duty of the collector, just as the collection of the freight money was said to be without his official duty in the present case; then the detention of these papers, so improperly issued by a deputy collector, could only furnish a ground for the recovery of damages upon the theory that the collector of the port was liable for the action of his deputy in issuing them, notwithstanding the fact that their issue was irregular and improper, *i. e.*, without the official duty of the collector.

In *Ogden vs. Maxwell*, 3 Blatchford, 319, the Court held a collector of customs liable personally for the illegal exaction of fees by his deputy in excess of the fees authorized by law, and this, although the collector was ignorant of the illegal exactions and had accounted for and paid over to the treasury the amount of the illegal fees. The Court in rendering its opinion relied upon the case of *McIntyre vs. Trumbull*, 7 Johnson's Reports, 35, which is one of a number of cases, in which a sheriff has been held liable for the illegal or wrongful acts of his deputy, whether the sheriff knew of the act or not, or had recognized it or not. In thus citing and adopting the doctrine of this latter decision, the Court obviously held the relation between a deputy collector and the collector to be of the same character as that of a deputy sheriff to his principal, the sheriff, and not at all the relation of a superior officer to a subordinate officer in the public service. As to the latter I make no doubt of the principle, that is recognized in several authoritative cases, that

as to public officers generally, each is responsible for his own acts or negligence and not for those of any other public officer, although the latter may be subordinate to and selected by the former.

If it be true that the collector appoints his deputy, and discharges him at his pleasure, to act for him and under his orders, why does he not stand in the relation of principal towards him, and for the acts done within the apparent scope of his authority stand liable for them as every employer is responsible for the acts of his employe? Lord Brougham declared the principle of such responsibility "I am liable for what is done for me and under my orders by the man I employ, for I may turn him from that employ when I please; and the reason that I am liable is, that by employing him I set the whole thing in motion, and what he does, being done for my benefit and under my direction, I am responsible for the consequences of doing it." In this case clearly the duty of delivering the imported goods to consignees, upon the payment of the duties, was a duty devolving upon the collector which he might devolve upon his deputy. The duty to withhold the delivery of the goods until the freight thereon had been paid, which under the decision of *Mason vs. Fearson*, 9 Howard, 259, is an absolute duty, is a duty that devolved upon the collector officially, and which he had the right to perform by his deputy. The object of the statute was to secure to the carrier the payment of his freight, which in the event of the sale of the goods as forfeited by the United States, is required to be paid by the officer out of the proceeds of the sale. The statute does not provide what the proof to be produced to the satisfaction of the collector, that the freight has been paid, shall be. If now, in making the delivery of imported goods to the con-

signee and in requiring proof that the freight has been paid by the consignee, which are acts within the official duty of the collector, which duty is being performed by him through his deputy, he *exacts* and *requires* that the freight shall be paid through himself or be secured by a deposit of money with himself, for the use and benefit of the carrier, where are you to draw the line and declare that this action which is all done *colore officii*, is not done by the collector officially in the discharge of his official duty, or in the abuse of his official power. In as much as a public officer, as held by this Court in the case cited of *Badger vs. Gutierez*, is individually responsible for an act irregularly done *colore officii*, why is not the collector responsible for the money that he thus exacts and receives, in behalf of the carrier, to protect himself from liability to the carrier for improperly surrendering the goods to the consignee in derogation of the carrier's lien? See *Clinton vs. Strong*, 9 Jhn., 370.

It seems to me that the question in the case whether the act of the deputy, regarding him as an agent, was within the scope of his authority was determined by the course and manner in which he was accustomed to conduct his principal's business. This deputy had been accustomed during the whole term of the defendant's office, which covered a period of six months, to exact the payment of the freights together with the duties as a condition to the delivery of the goods to a consignee. The freight and duties were generally paid by a single check for the whole amount of the duties and freight, drawn to the order of D. W. McClung, or "of the collector of customs," and endorsed by the deputy in the name of his principal, and collected by him in the usual course of business for his principal. This Court in the recent case of *Martin vs. Webb*, 110 U. S., 7, declared that

the authority of the cashier of a bank in transactions outside of his ordinary duties might be inferred from the general manner in which for a period sufficiently long to establish a settled course of business, he has been allowed without interference to conduct the affairs of the bank, and when in numerous business transactions, he has been permitted without objection and in his official capacity to pursue a particular course of conduct it may be presumed that he has acted in conformity with directions received from those who have a right to control his operation. This is a doctrine which, it seems to me, is not peculiarly applicable to the cashiers of banks, as a class of agents, but it is as applicable to a deputy, acting as cashier of a collector of customs; and where the transactions of this kind, in which he is engaged, are necessarily so numerous as those connected with the performance of his duties in the delivery of imported goods to the consignees, their performance in a particular manner by the deputy for a period of six months, should conclusively establish a course of business sanctioned by his principal and for which his principal should be held responsible.

The language of the Act of Congress which declares that the collector shall "be responsible for the acts of his deputy in the execution of such trust" is general. It is not restricted in its terms to liability incurred to the United States, but it includes all who are interested in the performance of the trust, and among these under the express provisions of the statute, I submit, is the common carrier whose lien for his freight, it is made the duty of the collector to protect in the execution of his trust. This provision of the statute it seems to me strengthens very much the argument in support of the collector's liability for such acts of his deputy as these in question.

When the Court refused the special charge asked for by plaintiff, and instructed the jury that if the defendant undertook to act as he did, it was by virtue of an express or implied contract with the plaintiff, and therein he was but acting in his private capacity and not in the discharge of any official duty, and that it required express knowledge to be brought home to the defendant of the course of business pursued by his deputy and acquiescense therein in order to entitle the plaintiff to recover, I submit that the Court erred in defining the liability of the defendant for his deputy and cashier.

II.

The first proposition that the Court erred in overruling the motion to remand the case procedes upon the view that the Court below took at the trial of the cause, of the nature of the cause of action set forth in the petition. As will have been seen, by reference to the charge, the Court held that the allegations contained in the petition of the official character of the defendant, and of his duty as such officer to give the seasonable notice to the plaintiff required by statute, before delivering the goods to the consignees, to the end that the carrier's lien for freight might be preserved, were not material allegations, but were allegations simply by way of inducement, or in explanation of the averments which constituted the substantial ground of action. That cause of action the Court declared to be an express or implied contract by the defendant as an individual to collect and pay over to the plaintiff, the freight money due to it as a common carrier. The Court expressly declared that the allegations of the petition disclosed no breach of official duty upon the part of the de-

fendant and disclosed no act by reason of his official relation to the subject whereon the plaintiff ought to recover. If this was a correct view or construction of the petition, if the only issue presented by it was the breach of the contract obligation entered into by the defendant individually and not as an officer, then surely the allegation in the petition of the defendant for a writ of certiorari, that all his acts in connection with the receipt and delivery of merchandise described in the petition, were done by him under color of his said office, was not a sufficient allegation upon which to remove such a case from the State to the Federal Court. In this view of the cause of action alleged, taken by the Court below at the trial, no complaint was made of the defendant for any act done by him in connection with the receipt of said merchandise described in the petition, but the act complained of was simply a breach of contract, alleged to have been entered into by the defendant with the plaintiff, by the non-performance of his contractual obligation. Surely such a cause could not be removed from the State to the Federal Court upon the allegation that the defendant was a collector of customs and made the contract and violated it by color of his office.

It has never been my contention that this was a correct view of the cause of action set forth in the petition. The petition filed in the State Court under the rules of pleading and of practice provided by the code of the State is not affected in its character by the prayer for the relief to which the plaintiff conceives it is entitled. If the prayer is for a judgment for money due and received, while the allegations of the pleadings, which are sustained by the evidence adduced at the trial, entitle the plaintiff to damages for a wrong done or a violation of official duty by the defendant,

the relief prayed for does not affect the right of recovery upon the ground of action so established by the proof at the trial. But if the view of the petition taken by the Court below at the trial was correct, it seems to me that consistency required that it should have taken the same view upon the motion to remand the case to the State Court and its judgment cannot be consistently upheld in this Court by confirming its rulings upon these several questions as they were presented to the Court below.

III.

If the plaintiff by its allegations that the defendant, being collector was charged by the statute with the duty of protecting the carrier's lien by giving the plaintiff notice of his intention to make delivery of the goods and of his failure to discharge that duty, whereby the plaintiff's lien was lost, constitutes a valid cause of action for damages against the defendant, then the plaintiff having offered proof tending to establish that cause of action as alleged, the Court erred in withdrawing the consideration of that evidence from the jury and in charging the jury as a matter of law, that the defendant was under no legal liability to the plaintiff by reason of these facts. It is said by the Court below in substance, that in an action for wrongful acts whereby the plaintiff's security for a money debt is impaired or lost to the plaintiff, that it is a necessary averment of the petition or declaration that the debt remains due and unpaid at the time of the commencement of the action. I have examined quite a number of cases where the action was for wrongful acts impairing or destroying such a security, and I have found none, before this decision of the Court below, in which it was held that the continued indebtedness at the time of the

commencement of the action must be expressly alleged by the plaintiff in his petition. Of course the payment and discharge of the entire indebtedness by the debtor would extinguish the claim for damages and might be pleaded in defence of the action. The allegation of the facts creating indebtedness being made, as well as the facts constituting or creating the lien, and the wrongful acts whereby the lien is impaired or destroyed being averred, I conceive that a sufficient cause of action is stated under the requirements of any practice in pleading with which I am acquainted.

In *Case vs. Bank*, 100 U. S., 446, the action was by the Citizens' Bank, alleging the pledge to it of stock to secure the payment of a note of Lizardi & Co. for twenty thousand dollars. The petition alleged that the note was not paid at maturity, and that the defendant had done wrongful acts impairing the value of the security. The petition contained no allegation that the debt was owing and unpaid at the time of the commencement of the suit. An exception was filed to the petition upon the ground that it did not disclose a cause of action and was overruled by the Court below, and this Court sustained the judgment of the Court below, although no point appears to have been made before this Court that the petition was insufficient for the want of this specific allegation.

In the case of *King vs. Bangs*, 120 Mass., 514, an action against a third party by a mortgagee for injury to the mortgaged property, the defence of payment of the mortgage debt before the commencement of the action was made by answer and was held to be a valid defence so far at least, as to mitigate the damages to a nominal amount. In this case the case of *Gooding vs. Shear*, 103 Mass., 360, is referred to, in which the form of the declaration is given, and it contains

no allegation that the debt had not been paid at the time of the commencement of the suit.

But the learned judge in this case charged the jury not only that an averment was neecessary that the freights due the plaintiff, for which it had a lien, were owing and unpaid at the time of the commencement of the suit, but that, the petition in this case being to recover the freights in question upon the allegation that they were paid by the consignees to the defendant, the bringing of this action ratified and confirmed the payments even though the jury should find that they were not made to the plaintiff, nor to the defendant for the plaintiff, but were made to one J. L. Wartman, who was not a party to this suit, and whose agency to receive payment for the plaintiff was neither alleged by the plaintiff in its petition nor admitted at the trial, except so far as it was claimed that Wartman was an agent of the defendant, whereby the payment made to him was a payment to the defendant. I confess I am at a loss to understand by what course of reasoning the Court below could hold that the commencement of an action against McClung for an alleged payment made to him, could be held to be a ratification of a payment made to Wartman, who, unless he was the agent of McClung, was an entire stranger to the transaction upon which the plaintiff claimed to recover.

The plaintiff's cause of action, as it conceived it, and attempted to allege it, presented an alternative upon either branch of which, the plaintiff conceived that it was entitled to a recovery against the defendant. He was the collector of customs, charged by the statute with the performance of a duty to the carrier, which, in effect, constituted him a bailee of the carrier for the protection of its lien for freight. Now either the collector had failed to perform that duty by

delivering goods to the consignee without notice to the carrier, and without any proof of payment to the carrier, or, on the other hand with the sanction and acquiescence of the carrier, the defendant had received payment of the freight for the use and benefit of the carrier, and was responsible to the plaintiff for the money so received. Upon either branch of this alternative, the plaintiff was entitled to recover in this action; in the one case its damages; in the other the amount received by the defendant for its use. The Court below, if I may so express myself, inverted these alternatives, and held that, although no payment had been made to the plaintiff, nor to the defendant for the plaintiff, the payment to a stranger, was sufficient to exonerate the defendant from the performance of his duty, under the statute, in respect to the plaintiff's lien.

I respectfully submit that the judgment below should be reversed and a *venire de novo* awarded.

E. W. KITTREDGE, with
RAMSEY, MAXWELL & MATTHEWS,
For Plaintiff in Error.

Office Supreme Court U. S.

119-454

Office Supreme Court U. S.
FILED.
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JAMES H. McKENNEY.
CLERK.

The Supreme Court of the United States.

The Cleveland, Columbus, Cincinnati and Indianapolis Railway Company

vs.

D. W. McClung.

Brief for Defendant in Error.

CHANING RICHARDS,
BENJ. BUTTERWORTH, } OF COUNSEL.

The Supreme Court of the United States.

THE CLEVELAND, COLUMBUS, CINCINNATI AND INDIANAPOLIS RAILWAY COMPANY
vs.
D. W. MCCLUNG.

Brief for Defendant in Error.

This action was commenced in the Superior Court of Cincinnati, and removed to the Circuit Court of the United States for the Southern District of Ohio on petition of defendant under Section 643 of the Revised Statutes.

The petition alleges that plaintiff, having a lien for freight upon certain imported merchandise transported in bond to Cincinnati, delivered the same to defendant, then Surveyor of Customs at that port, with notice of said lien: that it was the duty of defendant as such officer to refuse to deliver said goods and merchandise to the consignees until the freight thereon had been paid to plaintiff; that defendant received said freight from the several consignees for the account and benefit of plaintiff, and thereupon caused the goods and merchandise to be delivered to the consignees without notice to the plaintiff, whereby its lien for freight was lost; but though often requested has not paid to plaintiff the sums so collected by him, amounting in the aggregate to $8,477.50.

In his answer defendant denies that he received said money or any part thereof for the account or benefit of plaintiff, or that it was his duty to refuse to deliver the goods.

The trial resulted in a verdict and judgment for defendant, which plaintiff now seeks to reverse.

The record (p. 44) discloses that, for many years prior to the appointment of defendant as surveyor, it had been the general usage and custom prevailing in the custom office at Cincinnati for consignees of imported goods to pay the freight thereon to the deputy who collected the duties, by whom they were paid from time to time to the carriers; that said usage and custom continued after defendant's appointment in March, 1881, until the following September, during which period, one, J. L. Wartman, a deputy in the office, received the several sums named in the petition, for which he has failed to account, but such collections were made without the knowledge of defendant, and no part of the money was paid over to him (p 46).

I.

As stated in brief for plaintiff (p 24) the petition "presented an alternative upon either branch of which the plaintiff conceived that it was entitled to a recovery against the defendant."

It was alleged, as one branch of the alternative, that defendant had failed to perform his duty by delivering the goods to consignees without notice to the carrier, and without proof of payment to the carrier, whereby the lien was lost; the other branch being that defendant had himself received payment of the freight for the account and benefit of plaintiff.

Exception is taken to the charge of the Court upon the first branch of this alternative that, in order to authorize a recovery against defendant for failing to give the notice to plaintiff required by the statute before delivering the goods to consignees, an averment that the freight due plaintiff, and for which it had a lien, were owing and unpaid, is necessary; that there is no such averment in the petition, on the contrary, it distinctly avers that the consignees did pay the freights to defendant, who, by suing for the same, ratifies and confirms the payments, and that the case must therefore be tried upon the hypothesis that the freights due from consignees had been paid before delivery, in which case no notice is required.

It is argued in support of the exception that in an action for wrongful acts, whereby the security for a debt is lost or impaired, it is not necessary to expressly allege continued indebtedness at the commencement of the action. It is conceded in argument (p. 23) that this was not directly decided in either of the cases cited, and no inference can fairly be drawn from failure to note a technical defect, which could readily be remedied by an amendment if the fact existed.

But the charge in question does not rest upon the mere lack of such averment, as the petition contains the direct allegation that freight had been paid. Moreover, the charge does not involve a mere question of pleading. It was certainly necessary for plaintiff to prove that the freight had not been paid, and the evidence showed (record p. 44) that the consignees had paid the freight in accordance with a usage of long standing. Having acquiesced in such mode of payment for years, how could the carriers thereafter assert a lien upon the goods against consignees? Upon the facts of the case, as well as the pleadings, the Court was clearly justified in instructing the jury that the plaintiff must recover, if at all, upon the other branch of the alternative—its allegation that defendant had collected the money for plaintiff's use.

II.

Upon that issue the Court charged in substance that the collection of freight for a carrier of imported goods was not an official duty, and defendant would not be liable for money thus collected by his deputy by reason of the official relation, unless he had in some way authorized his deputy so to act; that "if the deputy acted without authority from the defendant, and the defendant did not know of his said action, nor hold him out to the plaintiff as his agent, nor do or say anything to mislead the plaintiff nor his officers nor agents, nor undertake nor assume to collect plaintiff's freight, he would not be liable to plaintiff's demand" (p. 48-9). The Court also refused to give a special charge asked by plaintiff embodying the converse proposition (p. 47). Exceptions were taken thereto, and also to the admission of evidence tending to show that the deputy acted without the knowledge and consent of defendant (p. 46).

These several exceptions present the question whether defendant is liable to plaintiff for the money so collected by his deputy by reason of their official relation.

It is contended on behalf of plaintiff that a collector is liable for the acts of his deputy "as every employer is responsible for the acts of his employee."

But public officers are not generally liable for the default, negligence, misfeasance, or non-feasance of subordinates even in the discharge of their public duties.

Story on Agency, Sec. 319.

The legal relation between public officers and their sworn assistants is not generally that of a master and servant, or

principal and agent, and the liability of an official superior for the default of an assistant arises only in case of his own misconduct or neglect.

U. S. *vs.* Collier, 3 Blatch, 349.

It has been repeatedly decided that a postmaster is not liable for the loss of money or letters through the negligence or dishonesty of their employees.

Whitfield *vs.* LeDespencer, Cowp., 754 ;

Wiggins *vs.* Hathaway, 6 Barb., 635.

And the same principle has been applied by the Supreme Court of Ohio to mail contractors.

Conwell *vs.* Vorhees, 13 Ohio, 541.

The Court says, (p. 543)—

"But public agents, although in one sense treated as principals, are not responsible for the omission, negligence, or misfeasance of those employed under them, if they have employed trustworthy persons of suitable skill and ability, and have not co-operated in the wrong."

In Dunlop *vs.* Munroe, 7 Cranch, 242, where the plaintiff sought to hold a postmaster liable for money lost from the mail, it was held that, under an allegation of negligence on part of defendant, evidence could not be given of the negligence of his sworn assistant.

Johnson, J., delivering the opinion of the Court says :

"Now the distinction between the relation of a postmaster to his sworn assistant acting under him, and between master and servant generally, has long been settled; and although the latter relation might sanction the admission of such evidence, we are unanimously of opinion that, if it is intended to charge a postmaster for the negligence of his assistants, the pleadings must be made up according to the case; and his liability then will only result from his own neglect in not properly superintending the discharge of their duties in his office."

It is contended that a different rule is applicable to a Collector of Customs and his deputy, but neither of the cases cited in plaintiff's brief (p. 15-16) is at variance with the cases above referred to.

As the Collector is liable to the Government for certain acts of the deputy (Sec. 2630, R. S.), he may accept a bond for his own protection as decided in Dignan *vs.* Shields, 51 Texas, 322, but no inference can be drawn therefrom in support of his liability to individuals. In the case of Ogden *vs.* Maxwell, 3 Blatch; 319, also cited, it does not appear whether

the illegal fees were exacted by the collector himself or his deputy, but, inasmuch as they were accepted by the collector as emoluments, it was of course immaterial, and when that decision is read in connection with the following case in the same report—U.S *vs.* Collier, 3 Blatch, 349, already cited—which was decided by the same judges, directly involving the liability of a collector, it is very clear that the Court did not regard the relation between such collector and his deputy to be other than the general relation of a superior officer to his subordinates in the public service, as suggested in argument for plaintiff. And in Brissac et al. *vs.* Lawrence, 2 Blatch, 121, which was an action against a collector for the value of goods lost from the warehouse, Judge Nelson charged the jury that the defendant was not liable unless personally guilty of negligence.

But the collection of freight due to carriers was not a duty imposed by law upon either the defendant or his deputy. How, then, can he be held liable for such extra official action of the deputy merely by virtue of the official relation?

Whether he had otherwise authorized the deputy so to act was submitted to the jury in a form to which plaintiff could not except. The Court charged (p. 49.)—

"If defendant had knowledge of this custom acquired from observation, from the business and books of his office, or through other sources, and acquiesced therein and permitted the plaintiff to make its collections through his deputy, in the belief that he was acting for and as his agent, or by his acts or declarations represented or held him out as his agent in the matter, the plaintiff and defendant both understanding and tacitly or otherwise agreeing that the freights due the plaintiff should be paid in this way, in lieu of the notice which the statute in the contingency described required the collector to give to the plaintiff, he would be liable to the plaintiff for all sums so paid to the deputy for plaintiff's use."

Having failed to show that defendant had in any way authorized Wartman to collect these freights, plaintiff could have no just claim against him because Wartman had misappropriated the funds.

It was manifestly a convenient arrangement for carriers as well as consignees to have the freight paid to the deputy who collected the duties. Even if this arrangement, which had continued some ten years, was originally sanctioned by the Surveyor then in office, and he thereby assumed personal responsibility to the carriers, his action would impose no such respon-

sibility upon a successor, and it would be grossly unjust to hold defendant liable for money so collected without his sanction or knowledge.

III.

Upon removal of the case to the Circuit Court, a motion made by plaintiff to remand was overruled by the Court, which is also assigned as error.

The case was removed under the provisions of Section 643 of the Revised Statutes, which provides that any civil suit or criminal prosecution against a revenue officer on account of an act done under color of his office may be removed upon petition of defendant setting forth the nature of the suit.

The petition alleges that defendant was Surveyor of Customs and "all his acts in connection with the receipt and delivery of the merchandise described in said petition were done by him under color of his said office."

It is not claimed in argument that the Court erred in refusing to remand the case, but that the refusal was inconsistent with the charge at the trial of which plaintiff complains.

It is contended that if—as the Judge held at the trial—the petition did not sufficiently allege a failure to perform an official duty, the cause was not removable under the Act of Congress, and that the allegations of the petition for removal are insufficient, if such construction be given to plaintiff's petition.

This might be so if the action were simply for money collected by defendant for the use of plaintiff—as defendant could only remove it upon the allegation that he had received the money under color of his office, which would be fatal to his defense. But plaintiff also asserted, and still persists in, a claim against him by reason of a wrongful delivery of the goods, which, as alleged in the petition for removal, was done by him under color of his office. Whether he had failed to perform his official duty in that respect was an issue removable to the Federal Courts, and none the less removable because the Circuit Court subsequently found that the claim was insufficiently alleged, or defeated by facts disclosed in the petition or at the trial.

It was held in the case of Tennessee *vs.* Davis, 100 U. S., 264, t hat a prosecution for murder was removable under this statut e upon the allegation that the killing was done in self-defense' while engaged in the discharge of his duty as deputy collector. The Court says, (p. 261) that "the Act of Congress

authorizes the removal of any cause, when the acts of the defendant complained of were done or claimed to have been done in the discharge of his duty as an Federal officer." To the same effect was the decision in Davis *vs.* South Carolina, 107 U. S., 597, also a prosecution for murder.

If the officer be entitled to removal in such a case, the statute must certainly apply to a civil suit, wherein liability is asserted for the delivery of goods in violation of his official duty.

Nor is it material that other issues of law or of fact are involved in the case.

Tennessee *vs.* Davis, 100 U. S., 264.

Osborn *vs.* Bank of U. S., 9 Wheat., 738.

We respectfully submit that no error is disclosed in the record, and the judgment below should be affirmed.

CHANING RICHARDS,

BENJ. BUTTERWORTH,

of Counsel.